DOCKET

No. 86-1781-CFX
Status: GRANTED

Title: Richard Schweiker, et al., Petitioners
v.
James Chilicky, et al.

Docketed:
May 6, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Morris,William E., Tribe,Laurence H.

NOTE: Time to file ext by O'Connor, J. to & inc. 5/7/87 cited

Entry	Date	Note	Proceedings and Orders
1	Feb 25 1987		Application for extension of time to file petition and order granting same until May 7, 1987 (O'Connor, February 27, 1987).
2	May 6 1987	G	Petition for writ of certiorari filed.
3	Jun 4 1987		Brief of respondents James Chilicky, et al. in opposition filed.
4	Jun 9 1987		DISTRIBUTED. June 25, 1987
5	Jul 22 1987		REDISTRIBUTED. September 28, 1987
6	Oct 5 1987		Petition GRANTED.
			**********
7	Oct 14 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	Nov 2 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
10	Nov 10 1987		Order extending time to file brief of petitioner on the merits until December 3, 1987.
11	Dec 3 1987		Brief of petitioners Richard Schweiker, et al. filed.
12	Dec 8 1987		Record filed.
		*	Certified copy of original record and C. A. proceedings received, 3 volumes.
14	Dec 9 1987		Order extending time to file brief of respondent on the merits until January 22, 1988.
15	Jan 5 1988		SET FOR ARGUMENT. Tuesday, March 1, 1988. (4th case). (1 hour).
16	Jan 20 1988		CIRCULATED.
17	Jan 22 1988	X	Brief of respondents James Chilicky, et al. filed.
18	Jan 22 1988	X	Brief amici curiae of National Mental Health Association, et al. filed.
19	Jan 22 1988	X	Brief amici curiae of ACLU, et al. filed.
20	Feb 12 1988	X	Reply brief of petitioners Richard Schweiker, et al. filed.
21	Mar 1 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 86 1781

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD SCHWEIKER, ET AL., PETITIONERS

v.

JAMES CHILICKY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits.

PARTIES TO THE PROCEEDING

Petitioners are Richard Schweiker, former Secretary of Health and Human Services; John Svahn, former Commissioner of the Social Security Administration; and William R. Sims, Director of the Arizona Disability Determination Service. Respondents are James Chilicky, Dora Adelerte, and Spencer Harris.[1]

[1] In the original complaint there were, besides respondents, seven other plaintiffs. These seven, who did not pursue the appeal to the Ninth Circuit, were Atanacio Alamanza, Arthur Flynn, Donald Bond, Demitrio Higuera, Joseph Tellez, Bonnie Bircher, and Connie Diaz.

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OCTOBER TERM, 1986

No.

RICHARD SCHWEIKER, ET AL., PETITIONERS

v.

JAMES CHILICKY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General—on behalf of Richard Schweiker, former Secretary of Health and Human Services; John Svahn, former Commissioner of the Social Security Administration; and William R. Sims, Director of the Arizona Disability Determination Service (Arizona's component of the social security disability program)—petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-14a) is reported at 796 F.2d 1131. The opinion of the district court (App., *infra,* 15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 19a-20a) was entered on August 12, 1986. A petition for rehearing with a suggestion for rehearing en banc was denied on December 8, 1986 (App., *infra,* 21a-22a). On

February 27, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including May 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions, 42 U.S.C. (& Supp. III) 405(g) and (h), are set forth in App., *infra*, 24a-26a.

STATEMENT

A. The Statutory And Regulatory Framework For Review of Disability Claims

1. The disability programs under Title II (see 42 U.S.C. (& Supp. III) 401 *et seq.*) and Title XVI (see 42 U.S.C. (& Supp. III) 1381 *et seq.*) of the Social Security Act are administered jointly by state agencies and the Secretary of Health and Human Services. Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a state agency (here, the Arizona Disability Determination Service), pursuant to regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. (& Supp. III) 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903; *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 3.

If the state agency makes an initial determination that a new applicant is not disabled—or that the disability of a current recipient has ceased (see 42 U.S.C (& Supp. III) 421(i))—the individual may request a de novo reconsideration by the state agency. The claimant has the right to a face-to-face interview before the reconsideration (see 42 U.S.C. 405(b)(2); 20 C.F.R. 404.917) and he is personally notified that he must request reconsideration within 60 days of his receipt of the adverse initial determination. 20

C.F.R. 404.904, 404.909(a)(1), 416.1404, 416.1409(a). If he does not do so, the adverse initial determination becomes binding upon him. 20 C.F.R. 404.905, 416.1405.

If an individual is dissatisfied with the agency's decision on reconsideration, he "shall be entitled to a hearing thereon by the Secretary." 42 U.S.C. (Supp. III) 421(d); see also 42 U.S.C. 1383(c)(1). The Act requires—and the claimant is personally notified—that he must request such a hearing, which will be conducted by an ALJ, within 60 days of his receipt of the state agency's reconsideration decision. 42 U.S.C. (Supp. III) 405(b)(1); 42 U.S.C. 1383(c)(1). Absent such timely request, the state agency's decision becomes binding upon the claimant. 20 C.F.R. 404.920, 404.921(a), 404.933(b), 416.1404(b)(3), 416.1405, 416.1420, 416.1421(a), 416.1433(b). If the ALJ's decision is adverse to the claimant, he then may seek review by the Appeals Council of the Social Security Administration (SSA). The claimant is specifically informed that if he does not seek such review within 60 days, the adverse ALJ decision is binding. 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468.

After the Appeals Council has either denied review of the ALJ's decision or granted review and rendered its own decision, the claimant may seek judicial review pursuant to 42 U.S.C. 405(g). See 42 U.S.C. (Supp. III) 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210.

2. In addition to the multi-level framework for review just outlined, Congress has afforded other procedural protections for individuals, like respondents here, who have been receiving disability benefits but whose eligibility to continue to receive such benefits is under review by the Secretary. With respect to recipients of Title II benefits, Congress in 1983 enacted temporary legislation (which has been extended through January 1, 1988), permitting claimants to continue to receive benefits following an

adverse initial decision until an ALJ had rendered a decision on the claim. Pub. L. No. 97-455, § 2, 96 Stat. 2498, codified at 42 U.S.C. (Supp. III) 423(g); Pub. L. No. 98-460, § 7(a)(2), 98 Stat. 1802. Congress has afforded the same protection to Title XVI (Supplemental Security Income (SSI)) recipients, whose eligibility is based on need. See Pub. L. No. 98-460, § 7(b), 98 Stat. 1803, codified at 42 U.S.C. (& Supp. III) 1383(a)(7). This statutory action followed years of a similar regulatory practice with respect to SSI recipients. See 20 C.F.R. 416.1336(b).

Finally, Congress has required the Secretary to establish demonstration projects in at least five states, pursuant to which the Secretary gives Title II and Title XVI claimants the opportunity for a personal appearance *prior to* the initial determination of ineligibility under 42 U.S.C. (& Supp. III) 421(i), rather than afterwards. Pub. L. No. 98-460, § 6(d), 98 Stat. 1802, codified at 42 U.S.C. 421 note. Thus the recipient is enabled to argue his claim in advance of the initial determination, where the state agency has reached a preliminary conclusion adverse to the claimant. Congress has directed the Secretary to file a report concerning these projects. *Ibid.*

B. The Proceedings in This Case

1. Respondents are three individuals[2] who were beneficiaries of disability benefits under Title II or Title XVI. They filed suit against Richard Schweiker, John Svahn, and William R. Sims in their official and individual capacities.[3] Richard Schweiker is the former Secretary of

[2] Respondents have withdrawn their earlier motion for class certification (see App., *infra*, 4a, 15a). As stated at page II note 1, *supra*, of the ten original plaintiffs only the three respondents pursued their claim through the court of appeals.

[3] Respondents failed to serve two additional defendants properly, and consequently the district court dismissed the claims against them in their individual capacities (App., *infra*, 2a-3a n.1, 16a). By the time

Health and Human Services; John Svahn is the former Commissioner of the Social Security Administration; and William R. Sims is the present director of the Arizona Disability Determination Service.[4] App., *infra*, 2a, 15a-16a.

Respondents were subject to "continuing disability review" (CDR), a process Congress enacted in 1980 to ensure that only those individuals whose medical conditions still warranted disability status received payment. Pub. L. No. 96-265, § 311(a), 94 Stat. 460, codified at 42 U.S.C. (& Supp. III) 421(i); see also App., *infra*, 2a. Their benefits were terminated by the CDR process; the benefits were, however, ultimately reinstated through the administrative appeals process. See App., *infra*, 2a.

In their complaint, respondents claimed that petitioners had violated their due process rights by, inter alia, accelerating the starting date of the CDR process; illegally nonacquiescing in the law of the circuit; failing to apply uniform written standards in implementing the CDR process; failing to render decisions consistent with allegedly dispositive evidence; and using an impermissible quota system under which state agencies were required to terminate a certain number of recipients. App., *infra*, 2a-3a; see also page 7 note 6, *infra*. Respondents sought injunctive and declaratory relief, and money damages for "emotional distress and for loss of food, shelter and other necessities proximately caused by [petitioners'] denial of benefits without due process" (App., *infra*, 3a n.2).

2. The district court dismissed the case in its entirety on qualified immunity grounds (App., *infra*, 15a-18a). It discussed why the government's policies of accelerated re-

the case reached the court of appeals, only claims against officials in their individual capacities remained (*id.* at 4a), and consequently these two defendants are no longer in the case.

[4] The Arizona DDS is authorized by statute and is an integral part of the federal disability determination process. See 42 U.S.C. (& Supp. III) 421(a).

view and non-acquiescence violated no clearly established statutory or constitutional rights, and thus concluded that *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), barred respondents' damage claims with respect to these policies (App., *infra,* 16a-18a). The district court did not discuss respondents' other claims, but apparently determined that they were barred by qualified immunity as well (see *id.* at 16a, 18a).

3. Respondents then appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed in part, reversed in part, and remanded the case to the district court for further proceedings (App., *infra,* 1a-14a). On appeal, the only issues raised by respondents pertained to their *Bivens* [5] claims for money damages against petitioners in their individual capacities (see Resp. C.A. Br. ii).

Petitioners contended that there was no subject matter jurisdiction to entertain respondents' claims, since the procedures set forth in 42 U.S.C. 405(g) are the exclusive means of redress for actions "arising under" the relevant provisions of the Social Security Act. See 42 U.S.C. (Supp. III) 405(h). They also pointed out that the existence of the Act's elaborate procedures for resolving disability claims counsels strongly against judicial implication of a damages remedy, and that there could be no colorable claim of denial of due process when respondents were afforded the protections of Section 405(g). Petitioners also contended that the district court lacked personal jurisdiction as well as subject matter jurisdiction, and that in any event respondents' claims were barred by qualified immunity.

The court of appeals found that the district court had subject matter jurisdiction (App., *infra,* 4a-6a). It reasoned that the action was not for restoration of disability benefits, but rather for damages stemming from constitutional violations committed in terminating those benefits, so that it did not arise under the Social Security Act and was not barred by Section 405(h) (App., *infra,* 6a). The court then ruled that the officials waived their personal jurisdiction defense by not raising it at the appropriate stage in the district court proceedings (*id.* at 7a-9a). Finally, the court of appeals affirmed the district court's dismissal on qualified immunity grounds of respondents' acceleration of review and nonacquiescence claims (*id.* at 11a-13a), but reversed the district court's dismissal on qualified immunity grounds of the balance of respondents' claims[6] and remanded for futher proceedings (*id.* at 13a-14a). The court of appeals concluded that under the current record it could not determine that respondents could prove no state of facts establiishing an actionable due process violation for the latter claims (*id.* at 14a).

The court of appeals denied petitioners' petition for rehearing with a suggestion for rehearing en banc, which was limited to the subject matter jurisdiction issue (App., *infra,* 21a-22a).

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[5] See *Bivens* v. *Six Unknown Named Federal Narcotics Agents,* 403 U.S. 388 (1971).

[6] As described by the court of appeals (App., *infra,* 13a-14a), the remaining allegations are:

1. Knowing use of unpublished criteria and rules and standards contrary to the Social Security Act.
2. Intentional disregard of dispositive favorable evidence.
3. Purposeful selection of biased physicians and staff to review claims.
4. Imposition of quotas.
5. Failure to review impartially adverse decisions.
6. Arbitrary reversal of favorable decisions.
7. Denial of benefits based on the type of disabling impairment.
8. Unreasonable delays in receiving hearings after termination of benefits.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals can be squared with neither the plain language of Section 405(h) nor the decision of this Court in *Bush* v. *Lucas*, 462 U.S. 367 (1983). Furthermore, the creation of a *Bivens* remedy for social security claims would threaten to overwhelm not only the Social Security Administration but also the federal courts with an avalanche of litigation. If respondents—who were ultimately denied not a penny of benefits and whose damage claims border on the frivolous—can maintain a *Bivens* action, then millions of social security claimants can do so as well. Accordingly, action by this Court is appropriate. At the same time, this is the first such ruling by a court of appeals since this Court's decision in *Bush* v. *Lucas*,[7] and there is no conflict in the circuits. The United States will shortly (May 13, 1987) file a petition for certiorari in *Cooper* v. *Kotarski*, posing the question of the application of *Bush* v. *Lucas* in the probationary employment context, where a clear circuit conflict has developed. In order to conserve this Court's limited plenary review docket, we suggest that the Court hold this petition pending resolution of *Kotarski*.

1. a. The court of appeals' decision is inconsistent with this Court's decision in *Bush* v. *Lucas*. In *Bush*, the plaintiff asked this Court to authorize a *Bivens* remedy for federal employees whose First Amendment rights are allegedly violated by their employers. In its analysis, the Court assumed that the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [plaintiff] for the harm he suffered" (462 U.S. at 372 (footnotes omitted))—that is, that "a federal right

[7] In the pre-*Bush* v. *Lucas* decision of *Ellis* v. *Blum*, 643 F.2d 68 (1981), the Second Circuit upheld similar actions for damages based on allegations of emotional distress, on reasoning similar to that of the court of appeals here.

has been violated and Congress has provided a less than complete remedy for the wrong" (*id.* at 373). It concluded, however, that the proper focus for analysis was not on "what remedy the court should provide for a wrong that would otherwise go unredressed," but rather on "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue" (*id.* at 388). The Court held that, in light of the comprehensive procedural and substantive provisions of the civil service laws governing the employment relationship between the government and its employees, which the Court emphasized had been carefully constructed by Congress over many years, it would be inappropriate to create a new *Bivens* remedy. *Id.* at 388-390; see also *id.* at 390-392 (Marshall, J., concurring).

Like the civil service laws, the Social Security Act's special statutory procedures were the result of a carefully considered, step-by-step fine-tuning by Congress. See, *e.g.*, *Heckler* v. *Day*, 467 U.S. 104, 111-118 (1984). This Court has noted that, "[t]o facilitate the orderly and sympathetic administration of the disability program of Title II, the Secretary and Congress have established an unusually protective four-step process [discussed at pages 2-4, *supra*] for the review and adjudication of disputed claims" (*id.* at 106). The scheme has, for at least the last decade, "inspired almost annual congressional debate" (*Heckler* v. *Day*, 467 U.S. at 112). Indeed, as discussed at pages 3-4, *supra*, Congress in 1983 specifically refined the administrative review process to address the very concerns at issue here—namely, that disability claimants might experience undue financial or emotional harm by a cut-off of benefits while they pursued their administrative remedies. Accordingly, claimants like respondents may now continue to receive benefits through the ALJ hearing

stage while they challenge an adverse decision made at an earlier stage of the administrative process, and, in statutorily mandated demonstration projects, are given an opportunity to appear and be heard *prior to* an initial determination, where the state agency has given preliminary indication of an adverse decision.

The structure and history of the social security disability program thus plainly demonstrate that we are dealing with a "comprehensive scheme * * * provid[ing] meaningful remedies" (*Bush*, 462 U.S. at 386), and that Congress has long been attentive to fine-tuning those remedies as necessary. This is a "pervasively regulated area," and the court of appeals decision is an "unwarranted judicial intrusion" (*Heckler* v. *Day*, 467 U.S. at 119). As in *Bush*, Congress has provided "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations" (*Bush*, 462 U.S. at 388), which would only be impaired by recognition of supplementary, piece-meal remedies. See *id.* at 379-380, 388-389; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314 (1947).

In *Bush*, this Court "decline[d] 'to create a new substantive legal liability without legislative aid and as at the common law,' * * * because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it" (462 U.S. at 390 (citation omitted)). And in connection with another section of the Social Security Act, this Court in *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984), observed that Congress must have understood that "hardship" could occur in the course of pursuing Section 405(g) remedies and, "[i]f the balance is to be struck anew, the decision must come from Congress and not from this Court." Precisely the same conclusion should be drawn here.

Furthermore, there is no reason to assume that the administrative and judicial review process painstakingly constructed and constantly adjusted by Congress is less than

a fully adequate remedy for an erroneous denial of benefits at a preliminary stage of that process, even if the purported consequences are somehow removed from that denial per se and even if the challenge is cast in "due process" terms. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 339-340 (1976).[8]

b. A *Bivens* remedy is inappropriate in the present context for a reason which did not obtain in *Bush*. The Court began in *Bush* by stressing that "Congress ha[d] not expressly precluded the creation of such a [*Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress" (462 U.S. at 373). See also *id.* at 377-378; *Carlson* v. *Green*, 446 U.S. 14, 19 (1980). In this case, on the other hand, Congress has done just that. 42 U.S.C. (Supp. III) 405(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who

[8] See also *Parratt* v. *Taylor*, 451 U.S. 527, 537-544 (1981). In *Parratt*, this Court declined to find that plaintiff had established a violation of the Due Process Clause of the Fourteenth Amendment, where the claimed deprivation occurred as the result of the unauthorized failure of agents of the State to follow an established state procedure. The Court specifically noted (*id.* at 544) that the state remedies may not have provided plaintiff with all of the relief which he might have claimed in an action brought under 42 U.S.C. 1983. Nevertheless, the Court ruled that "[t]he remedies provided could have fully compensated the [plaintiff] for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process" (451 U.S. at 544). See also *id.* at 555 n.1 (citations omitted) (Marshall, J., concurring in part and dissenting in part) ("To be sure, the state remedies would not have afforded [plaintiff] all the relief that would have been available in a § 1983 action. I nonetheless agree with the majority that 'they are sufficient to satisfy the requirements of due process.' "); *Hudson* v. *Palmer*, 468 U.S. 517, 530-536 (1984). Similarly, the remedies provided in Section 405(g) and the regulations issued pursuant to that section not only could have provided respondents with full relief from the denial of rights under the statute, but did so.

were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

Section 405(h), therefore, has two provisions which bar *Bivens* actions. Its second sentence plainly precludes the review of any finding of fact or other decision by the Secretary except as provided in the Social Security Act. Section 405(g), in turn, is the *only* mechanism in the Act for the review of such decisions. Moreover, the full remedy available under Section 405(g) is the retroactive payment of disability benefits wrongfully terminated—which respondents have already received. Under these provisions, judicial review of administrative decisions on claims for social security benefits is unavailable except where expressly authorized by the Social Security Act. See *Califano* v. *Sanders,* 430 U.S. 99, 110 (1977) (Stewart, J., concurring); S. Rep. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. 728, 76th Cong., 1st Sess. 43-44 (1939).

Similarly, the third sentence of Section 405(h) precludes suits brought under 28 U.S.C. 1331 "to recover on any claim arising under" the social security disability program. Notwithstanding the contrary conclusion of the court of appeals (App., *infra,* 6a), it is plain that respondents' *Bivens* action under Section 1331 "arises under" the disability benefits statute. This suit is exclusively concerned with the Secretary's administration of that statute and with rights created under it. Ironically, the court of appeals appears to rest its contrary decision on the fact that respondents' benefits under the statute have already been

restored, thus leading it to the erroneous inference that any remaining action relating to the earlier denial of benefits does not arise under the Act (see App., *infra,* 6a).

Nor will this Court's decisions under the statute support the court of appeals' decision. In *Heckler* v. *Ringer,* 466 U.S. at 615, 621-622, the Court held that plaintiffs' claims that the Secretary had violated their due process and statutory rights in denying medicare benefits "arose under" the Social Security Act. The Court stressed that the "arising under" language of Section 405(h) invokes a "broad test," which includes "any claims in which 'both the standing and the substantive basis for the presentation' of the claims is the Social Security Act." 466 U.S. at 615 (quoting *Weinberger* v. *Salfi,* 422 U.S. 749, 761 (1975)). The Court noted that plaintiffs had an "adequate remedy in Section 405(g)" (466 U.S. at 617), had not "raise[d] a claim wholly 'collateral' to their claim for benefits" (*id.* at 618), and had "no colorable claim that an erroneous denial of * * * benefits * * * cannot be remedied by the later payment of benefits" (*ibid.*). The Court concluded that plaintiffs' claim "must be construed as a 'claim arising under' the Medicare Act because any other construction would allow claimants substantially to undercut Congress' carefully crafted scheme" (*id.* at 621). See also *id.* at 615; *Weinberger* v. *Salfi,* 422 U.S. at 756-762.

Such reasoning is directly applicable to this case. Just as plaintiff Ringer's request for declaratory relief "arose under" the statute even though his claim was to ensure *future* benefits, respondents claims here arise under the statute even though their complaint is about the nonreceipt of *past* benefits. See 422 U.S. at 621. By holding otherwise, the court of appeals has "invit[ed] [respondents] to bypass the exhaustion requirements of the * * * Act" (*ibid.*).

This Court warned in *Weinberger* v. *Salfi* that the "sweeping and direct" jurisdictional bar embodied in the "arising under" language of Section 405(h) cannot be avoided simply because plaintiffs cast their allegations in constitutional terms (422 U.S. at 757, 760-761). That, of course, is all that respondents here have done. Their "due process" claim can be made by any claimant unhappy with an adverse benefit decision at any level of the administrative process. "Emotional distress" can be claimed every time an adverse benefits decision is rendered, and of course the denial of benefits will always cause the denial of what could have been bought with them—respondents' "loss of food, shelter and other necessities proximately caused by [petitioners'] denial of benefits" (see App., *infra*, 3a n.2). Cf. *Heckler* v. *Ringer*, 466 U.S. at 627. There is no other component to respondents' claim. Surely a construction of Section 405(h) that would allow any challenge to a benefits decision to be split into two parts—one governed by Section 405(g), the other immediately amenable to resolution as a *Bivens* claim in district court—would defeat any purpose of that statute. Thus, the purpose as well as the language of the statute would be defeated by the court of appeals' counterintuitive reading.

2. The potential impact of the court of appeals' decision—both on the federal courts and on the Social Security Administration—is dramatic. The SSA hearing system is " 'probably the largest adjudicative agency in the western world.' " *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted). See also *Califano* v. *Boles*, 443 U.S. 282, 283 (1979) ("As an exercise in governmental administration, the social security system is of unprecedented dimension."); *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971) ("The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend."). SSA processes some two million disability claims each year. See *Heckler* v. *Day*, 467 U.S. at 106. We are advised by HHS that in excess of 100 million other claims, under the Medicare, AFDC and retirement programs, are also processed annually. Under the court of appeals' decision, an adverse ruling at any stage of any one of these cases can give rise to a *Bivens* suit for delay in payment or emotional distress.[9] The burden of this litigation on the Social Security Administration and the courts would be staggering.

The effects of this decision within the Ninth Circuit, where it has precedential effect, and anywhere else that it is found persuasive, may include a substantial drain on agency resources to defend these *Bivens* actions. In addition, agency personnel who make disability (and presumably other eligibility) determinations will be inhibited in the performance of their duties, because they will know that their actions can result in individual damage actions against them. Cf. *Bush*, 462 U.S. at 388-389. This is true for both factual and policy determinations, and thus will affect all levels of program administration.

3. While the court of appeals' decision is clearly wrong and seriously disruptive, we suggest that this petition be held pending disposition of *Cooper* v. *Kotarski* (petition to be filed no later than May 13, 1987), which also raises issues regarding the proper application of *Bush* v.

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[9] The court of appeals' decision here also produces the rather anomalous result that claimants may seek damages for emotional distress resulting from an alleged deprivation of due process by the Secretary (and other officials) for any adverse benefit decision—even when, as here, the decision challenged is not the Secretary's final decision and even when the final decision turns out to be fully favorable to the claimant. This result, of course, is entirely inconsistent with the exhaustion requirements of Section 405(g). See *Weinberger* v. *Salfi*, 422 U.S. at 756-759.

Lucas.[10] In *Kotarski,* a probationary federal employee brought a *Bivens* action to obtain review of an employment action for which he was expressly denied any remedy under the civil service laws. We argue there that, pursuant to the principles established in *Bush,* a *Bivens* action cannot be used to secure rights that Congress expressly declined to extend to such probationary employees.

As we explain in our petition in *Kotarski,* that case presents the Court with a clear conflict in the circuits on an issue of great and recurrent practical importance to the government. It clearly requires this Court's review, and we believe that such review is likely to provide guidance in the application of *Bush* v. *Lucas* in the context of this case. The present case, by contrast, presents no intercircuit conflict. While we believe that absent *Kotarski* this case would merit full review, in the interest of conserving the Court's plenary docket, we recommend that this petition be held pending disposition of *Kotarski.* Should review be denied in that case, or if the Court's opinion there is not dispositive of this case, we urge that this petition be granted.

[10] A copy of our petition in *Kotarski* will be sent to opposing counsel at the time it is filed.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Cooper* v. *Kotarski,* petition for a writ of certiorari to be filed May 13, 1987.

Respectfully submitted.

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MAY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2828
DC No. CIV 82-528 GLO ACM

JAMES CHILICKY, DORA ADELERTE, AND SPENCER HARRIS,
PLAINTIFFS-APPELLANTS,

v.

RICHARD SCHWEIKER, FORMER SECRETARY OF HEALTH AND HUMAN SERVICES; JOHN SVAHN, FORMER COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION; AND WILLIAM R. SIMS, DIRECTOR OF THE ARIZONA DISABILITY DETERMINATION SERVICE, IN THEIR INDIVIDUAL CAPACITIES,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding
Argued and Submitted December 2, 1985
Phoenix, Arizona

[Filed Aug. 12, 1986]

OPINION

Before: BROWNING, SNEED, and HUG, Circuit Judges.

HUG, Circuit Judge:

This case concerns the personal liability of certain state and federal officials and their immunity from damages arising from their alleged violations of citizens' constitu-

tional rights. Appellants, whose Old Age, Survivors and Disability Insurance ("OASDI") and/or Supplemental Security Income ("SSI") disability benefits had been terminated during disability reviews in 1981, appeal the dismissal of their claims that appellees, the Secretary of Health and Human Services, the Commissioner of the Social Security Administration, and the Arizona state official who administered these disability benefits programs, unconstitutionally violated their rights under the Fifth Amendment in terminating appellants' benefits.

Appellants received disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* (1982), or under the Supplemental Security Income program, 42 U.S.C. § 1381 *et seq.* (1982). In 1980, Congress established, effective January 1, 1982, a continuing disability review ("CDR") process to insure that only those individuals whose medical conditions still warranted disability status received payment; however, the Secretary of Health and Human Services (the "Secretary" and "HHS," respectively) implemented the CDR process in March, 1981. Appellants' disability benefits were terminated by the CDR process; however, they were ultimately reinstated, either through the administrative appeals process or under the provisions of the Social Security Disability Benefits Reform Act of 1984, Pub.L. No. 98-460, 98 Stat. 1794.

On August 20, 1982, appellants James Chilicky, Spencer Harris, and Doris Adelerte, together with seven other similarly situated persons, filed suit against Richard Schweiker, then HHS Secretary, John Svahn, Social Security Commissioner, and William R. Sims, Arizona Director of Disability Determinations.[1] The complaint

[1] Both Schweiker and Svahn have since resigned, and pursuant to Federal Rule of Civil Procedure 25(d), Margaret Heckler and Martha McSteen were substituted for the named appellees. The district court found that the substituted appellees were not personally served with a copy of either the complaint or the amended complaint and, therefore, dismissed Heckler and McSteen in their individual capacity from the lawsuit. Appellants do not contest this ruling on appeal. We note, however, that the district court correctly ruled that, without personal service in accordance with Fed. R. Civ. P. 4(d), the district court lacked jurisdiction to render a personal judgment against these appellees. *See Hutchinson v. United States*, 677 F.2d 1322, 1328 (9th Cir. 1982).

asserted that the appellees ordered, sanctioned, or implemented numerous practices, in violation of federal law and the Fifth Amendment in administering the CDR process, which culminated in the termination of appellants' benefits. The appellants alleged, *inter alia*, that the appellees: (1) improperly accelerated the starting date of the CDR process from the statutory effective date of January 1982 to the earlier date of March 1, 1981; (2) illegally nonacquiesced in the law of this circuit; (3) failed to apply any uniform written standards in implementing the CDR process; (4) failed to render decisions consistent with allegedly dispositive evidence; and (5) used an impermissible "quota system" under which state agencies were required to terminate a certain number of recipients.[2] On November 15, 1982, prior to submission of an answer, appellees filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), asserting, *inter alia*, a lack of both subject matter jurisdiction and personal jurisdiction for insufficiency of service of process.

[2] The complaint sought: (1) certification of a class of disability benefit recipients whose benefits had been terminated through the CDR process; (2) a declaratory judgment that the CDR process, as then administered, violated federal law and the Fifth Amendment's due process clause; (3) preliminary and permanent injunctions enjoining the CDR process; (4) writs of mandamus directing the appellees to perform duties owed plaintiffs under federal law and the Fifth Amendment; (5) restoration of benefits; and (6) monetary awards for damages for "emotional distress and for loss of food, shelter and other necessities proximately caused by defendants' denial of benefits without due process . . . ."

On July 15, 1983, the district court stayed the proceedings pending disposition of *Lopez v. Heckler*. *See Lopez v. Heckler*, 725 F.2d 1489, 1493-96 (9th Cir. 1984) (detailing procedural history), *vacated and remanded* ___ U.S. ___, 105 S. Ct. 583, 83 L.Ed.2d 694 (1984). The district court vacated the stay on April 6, 1984.

Because of the *Lopez* decision and actions taken by HHS prior to, and as a result of, the 1984 Disability Benefits Reform Act, appellants withdrew their requests for class certification and for declaratory and injunctive relief. Thus, the only claim remaining was their claim for money damages against appellees in their individual capacities for due process violations in implementing the CDR process. Appellants' surviving claim is predicated on the constitutional tort theory of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). On October 16, 1984, the district court dismissed the claim, ruling as a matter of law that all appellees were insulated from liability under the doctrine of qualified immunity. The district court found that the acceleration of the CDR process, the problems encountered at the state level, and the standards utilized in the review process, including the purported nonacquiescence policy of the Secretary in decisions of the Ninth Circuit, were not violations of clearly established statutory or constitutional rights of which a reasonable person should have known.

DISCUSSION

A. Jurisdiction

1. Subject Matter

Appellees argue that the district court lacks subject matter jurisdiction of appellants' constitutional tort cause of action. Their argument is predicated on the assumption that appellants' action "arises under" the Social Security

Disability Act; thus, appellees contend, section 405(h), 42 U.S.C. § 405(h) (1982), precludes appellants' lawsuit. We disagree.

Section 405(g), 42 U.S.C. § 405(g) (1982) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . brought in the district court of the United States . . ." and that the "court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary . . . ."

Section 405(h) states:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under [Title II of the Social Security Disability Act].

We agree with appellees that appellants' claim for money damages may not be raised under section 405(g); that section does not expressly grant the district court the power to award money damages to remedy the emotional distress caused by erroneous administrative decisions or processes. Rather, the only remedy available under section 405(g) is the retroactive payment of disability benefits that were wrongfully terminated. Appellants have already had their benefits retroactively restored by the Secretary; they now seek further compensation by instituting a lawsuit for money damages. Section 405(g) affords no such relief.

We disagree, however, with appellees' contention that section 405(h) prohibits any non-section 405(g) action against the appellees from being brought under the Fifth Amendment due process clause.[3] Section 405(h) only precludes actions "arising under" Title II of the Social Security Disability Act, a section 405(g)-type action for disability benefits, from being instituted prior to exhaustion of administrative remedies. *Heckler v. Ringer*, 466 U.S. 602, 104 S. Ct. 2013, 2021-22 (1984); *Weinberger v. Salfi*, 422 U.S. 749, 764-66 (1975). Appellants do not pursue their remaining claim in an effort to have their disability benefits restored; this has been done. Rather, they seek damages for constitutional violations purportedly committed by appellees in terminating appellants' disability benefits. Consequently, the action does not arise under Title II of the Social Security Disability Act and is thus not barred by section 405(h). The district court has subject matter jurisdiction under 28 U.S.C. § 1331 over appellants' due process claim against all appellees. *Ellis v. Blum*, 643 F.2d 68, 75-76 (2d Cir. 1981). *See also Kuehner v. Schweiker*, 717 F.2d 813, 816-17, 819 (3d Cir. 1983), *vacated and remanded on other grounds*, ____ U.S. ____, 105 S. Ct. 376 (1984); *Ostroff v. State of Florida Dept. of Health and Rehabilitation Services*, 554 F. Supp. 347, 354 (M.D. Fla. 1983) (federal defendants).

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[3] Arguably, section 405(h)'s ban on actions "against the United States, the Secretary, or any officer or employee thereof" does not apply to suits against state officials, such as Sims. Because the state defendant Sims administers the federally-funded disability program, it can be argued that Sims was acting under color of federal law as an agent of the Secretary and, as such, is within the ambit of section 405(h). For jurisdictional purposes only, we conclude that Sims was acting under color of federal law. "To hold otherwise arguably would invite applicants for Title II benefits to circumvent sections 405(g) and (h) by bringing suit under section 1331 against the state officials instead of the Secretary . . . ." *Ellis v. Blum*, 643 F.2d 68, 76 (2d Cir. 1981).

2. Personal Jurisdiction

Although not expressly decided by the district court, Schweiker and Svahn contend that venue in the District Court of Arizona was improper and that the district court lacked personal jurisdiction over them because (1) the issuance of service of process was unauthorized and, thus, defective; and (2) there were not sufficient minimum contacts between the federal defendants and the State of Arizona necessary to satisfy the requirements of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and the Arizona long-arm statute.[4] Appellants argue that the district court did have personal jurisdiction over Schweiker and Svahn in their individual capacities, but that even if service of process was insufficient, personal jurisdiction under the Arizona long-arm statute was lacking, and venue was improper, these appellees waived their objections under Fed. R. Civ. P. 12(g) and (h).

Fed. R. Civ. P. 12, and specifically subdivisions (g) and (h), promote the early and simultaneous presentation and determination of preliminary defenses. Rule 12(g) requires that a party who raises a defense by motion prior to an answer raise all such possible defenses in a single motion; omitted defenses cannot be raised in a second, pre-answer

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[4] Arizona's long-arm statute, Ariz. R. Civ. P. 4(e)(2), provides:

> When the defendant is a resident of this state, or is a corporation doing business in this state, or is a person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state. In case of a corporation or partnership or unincorporated association, service under this Rule shall be made on one of the persons specified in Section 4(d)(6).

motion.[5] Rule 12(h) imposes a higher sanction with respect to the failure to raise the specific defenses of (1) lack of personal jurisdiction, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process.[6] If a party files a pre-answer motion, but does not raise one of the defenses enumerated above, the party waives the omitted defense and cannot subsequently raise it in his answer or otherwise. *See Myers v. American Dental Association,* 695 F.2d 716, 720-21 (3d Cir. 1982), *cert. denied,* 462 U.S. 1106 (1983); *Rauch v. Day & Night Manufacturing Corp.,* 576 F.2d 697, 701 (6th Cir. 1978); 2A J. Lucas & J. Moore, ¶ 12.23, at 2446-47 (2d ed. 1982).

> [A]ny time defendant makes a pre-answer Rule 12 motion, he must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b). If one or more of these defenses are omitted from the initial motion but were "then available" to the movant, they are permanently lost. Not only is defendant prevented from making it the subject of a second preliminary motion but he may not even assert the defense in his answer.

5 C. Wright & A. Miller, Federal Practice and Procedure, § 1391 at 852-53 (1969).

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[5] Fed. R. Civ. P. 12(g) provides that:

> A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

[6] Fed. R. Civ. P. 12(h) provides that:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Appellees maintain that their first responsive pleading, Motion to Dismiss filed on August 20, 1982, preserved their objection to lack of jurisdiction over the person. We disagree. The only ground stated in the motion to dismiss was the lack of service of process, or a Rule 12(b)(5) defense. The specific defenses – lack of jurisdiction of the person under the Arizona long-arm statute, a Rule 12(b)(2) defense, and improper venue, a Rule 12(b)(3) defense – were not raised, and are thus waived. Appellees have abandoned their Rule 12(b)(5) defense, absence of service of process, and now claim that service of process against these appellees for money damages is not authorized by statute. This specific defense was not raised, however, in the motion to dismiss; this objection is also waived.

We do not accept the argument that by objecting to the lack of service of process, appellees are deemed to have raised a Rule 12(b)(2) defense. Rules 12(b)(4) and (5) were not designed to challenge personal jurisdiction allegedly obtained pursuant to a long-arm statute; rather, they were designed to challenge irregularities in the contents of the summons (Rule 12(b)(4)) and irregularities in the manner of delivery of the summons and complaint (Rule 12(b)(5)). Appellees' personal jurisdiction challenge was made pursuant to Rule 12(b)(5); they now contest personal jurisdiction under Rule 12(b)(2). Appellees were required, but failed, to consolidate all their Rule 12 defenses in their motion to dismiss. As such, they waived their Rule 12(b)(2) defense.

B. Immunity of the Appellees[7]

The appellees argued, and the district court agreed, that they are entitled to qualified immunity on at least two of appellants' claims: acceleration of the CDR process and nonacquiescence in the law of this circuit. With qualified immunity, federal officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982); *Guerra v. Sutton,* 783 F.2d 1371, 1374 (9th Cir. 1986). Under *Harlow,* the standard is the objective reasonableness of the federal official's conduct. *Harlow,* 457 U.S. at 818. "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages 'unless it is further demonstrated that their conduct was unreasonable under the applicable standard.' " *Capoeman v. Reed,* 754 F.2d 1512, 1513 (9th Cir. 1985) (quoting *Davis v. Scherer,* 468 U.S. 183, 104 S. Ct. 3012, 3018 (1984)). In this case, the federal defendants are entitled to immunity if they can prove "that they acted under a *reasonable* (even if mistaken) belief that what they were doing was lawful." *Guerra,* 783 F.2d at 1374 (emphasis in original) (citing *Bilbrey v. Brown,* 738 F.2d 1462, 1466-67 (9th Cir. 1984)). The issue, as properly framed by the district court, is

[7] All defendants were sued in their individual as well as official capacity. The district court ruled that the appellants' action against appellees in their individual capacities was defeated by the application of the doctrine of qualified immunity to these appellees. Although the district court did not directly address appellants' action against appellees in their official capacities, the doctrine of sovereign immunity must be found to have been implicitly applied by the district court. To the extent that appellees were sued in their official capacities, these claims are barred by the doctrine of sovereign immunity. *See Gilbert v. DaGrossa,* 756 F.2d 1455, 1458-59 (9th Cir. 1985).

whether the law at the time of the appellees' alleged unlawful and unconstitutional activity clearly prohibited such conduct.[8] We review *de novo* the district court's order, dismissing the appellants' *Bivens* claims on the ground that appellees as a matter of law are entitled to qualified immunity. *Bilbrey v. Brown,* 738 F.2d 1462, 1467 (9th Cir. 1984).

The district court expressly found that (1) the acceleration of the CDR process, and (2) the nonacquiescence in the law of the Ninth Circuit were not violations of clear statutory or constitutional law so that a reasonable person would have acted otherwise, and granted to all appellees qualified immunity from appellants' claims.

The parties agree that Congress lawfully authorized the CDR process. Appellants object, however, to the Social Security Administration's acceleration of the CDR process, complaining that the states were ill-equipped to handle this increase in caseload. As the district court noted, Congress elected to delay implementation of the CDR process to allow the states time to employ and train personnel to handle the projected increase in disability review terminations. This staffing problem at the state level, however, extended beyond the congressionally-enacted effective date. Appellants' complaint, therefore, cannot be with the acceleration itself, but with the quality of the decisions rendered. Appellants' claimed erroneous disability terminations were redressable through the administrative review process; each appellant successfully utilized this mechanism. Neither the lawfully authorized CDR process, nor the acceleration of that program deprived appellants of any statutory or constitutional rights.

[8] Neither the parties nor the district court address the merits of the appellants' *Bivens* claims. As the merits of the *Bivens* claims are not before us on appeal, we do not pass on the legitimacy of appellants' claimed constitutional deprivations.

Appellants also challenge the actual review procedures adopted and utilized by the appellees, contending that these procedures differ from court-established standards.[9] Specifically, appellants argue that the Secretary lacks authority to nonacquiesce in decisions of the courts. We do not need to address this issue, however, because under *Harlow* and *Capoeman* we are concerned only with the question of whether appellees' conduct, at the time it occurred, was clearly a violation of appellants' statutory and constitutional rights.

Harlow's "clearly established" standard requires that, in the absence of binding precedent, the court look to all available decisonal law, including decision of state courts, other circuit courts, and district courts to determine whether the law is clearly established. *Capoeman,* 754 F.2d at 1514; *see also Ward v. County of San Diego,* 783 F.2d 1385, 1387 (9th Cir. 1986) (amended June 16, 1986). Absent binding precedent, the court should also evaluate the likelihood that the Supreme Court or this circuit would have reached the same result as courts that had already considered the issue. *Capoeman,* 754 F.2d at 1515; *Ward,* slip op. at 5.

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[9] The Secretary issued formal notice of nonacquiescence in *Finnegan v. Matthews,* 641 F.2d 1340, 1345 (9th Cir. 1981), and *Patti v. Schweiker,* 669 F.2d 582, 586-87 (9th Cir. 1982), which hold that under the applicable statutes, the Secretary was required, before terminating a recipient's Social Security benefits, to come forward with evidence that a recipient's medical condition had improved. The Secretary advised all administrative law judges that the Social Security Administration's policy, that termination of benefits is called for if evidence shows the recipient is not disabled under current criteria, was to be followed in all Circuit Courts of Appeal, even the Ninth Circuit, without obeying the Ninth Circuit's requirement that proof of improvement in the claimant's medical condition must be made before termination of disability benefits. SSR 82-10c; SSR 82-1459c.

Our examination of relevant statutory and decisional law at the time of the termination of benefits compels us to concur with the district court's evaluation: the law was not sufficiently clear in 1981 so as to expose to civil liability under *Bivens* those public officials, who in effect terminated disability benefits. At that time, there were no reported cases that held nonacquiescence by the Executive Branch in judicial decisions to be clearly unlawful. The officials charged with the responsibility of implementing and administering the CDR process were confronted with a congressionally mandated program designed to terminate benefits, a Presidential directive to implement that program some 10 months earlier than its effective date, and an administrative policy guideline instructing Social Security Administration officials to ignore certain case authority. In view of these factors, we find that appellees acted within the bounds of *Harlow*'s reasonable person standard. The constant tension between the Executive and Judicial Branches over the appropriate standard for terminating disability benefits, together with the Secretary's nonacquiescence policy, rendered assessment of the legality of the CDR process by even a legal scholar extremely difficult. Most government officials are not charged with "the kind of legal scholarship normally associated with law professors and academicians. A reasonable person standard adheres at all times." *Ward,* slip op. at 6.

The complaint alleges that some or all of the appellees violated the due process rights of the appellants in these other respects:

1. Knowing use of unpublished criteria and rules and standards contrary to the Social Security Act.
2. Intentional disregard of dispositive favorable evidence.
3. Purposeful selection of biased physicians and staff to review claims.

4. Imposition of quotas.
5. Failure to review impartially adverse decisions.
6. Arbitrary reversal of favorable decisions.
7. Denial of benefits based on the type of disabling impairment.
8. Unreasonable delays in receiving hearings after termination of benefits.

It cannot be determined as a matter of law that the appellants could prove no state of facts under these allegations that resulted in violations of their due process rights and consequent damages. Nor does the present state of the record establish as a matter of law that these appellees would be shielded from liability by qualified immunity.

Although we agree with the district court that qualified immunity precludes some of appellants claims, the case must be remanded for further proceedings on those claims above mentioned.

The decision of the district court is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 82-528 GLO ACM

JAMES CHILICKY, ET AL, PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL, DEFENDANTS.

[Filed Oct. 16, 1984]

ORDER

The defendants have moved to dismiss this action. The suit originally involved claims by a class of recipients of social security benefits against the Secretary of Health and Human Services, the Commissioner of the Social Security Administration and the director of the Arizona Disability Determination Service. The claims arose when the Administration under President Reagan ordered a large number of disability reviews for recipients of social security.

The plaintiffs asserted various claims for relief claiming that the review procedure violated their 5th amendment due process rights. Plaintiffs originally sought declaratory and injunctive relief plus damages in the form or retroactive benefits and compensation for emotional distress.

Through various legislative, judicial and administrative actions, the need to determine the declaratory and injunctive requests is no longer necessary. Each of the named plaintiffs had their benefits reinstated retroactively. Counsel for the plaintiffs has also withdrawn his motion to certify the class, leaving only a suit by ten named plaintiffs for emotional distress.

Suit was originally filed against Richard Schweiker, John Svahn and Robert Sims in their official and individual capacities. During the pendency of this action, Margaret Heckler succeeded Richard Schweiker as Secretary of Health and Human Services. Martha A. McSteen succeeded John Svahn as Commissioner of Social Security. Under Rule 25(d) of the Federal Rules of Civil Procedure these parties were substituted for the named plaintiffs.

The complaint in this action was served on Schweiker, Svahn and Sims. At no time were the substituted defendants Heckler and McSteen served although substitution occurred more than a year and a half ago. Dismissal as to these two defendants in their individual capacities is therefore appropiate. *See* Rule 4(j), Federal Rules of Civil Procedure. The court finds that there is no just cause for failure to serve during that time period.

One of the grounds asserted for dismissal of this action is immunity, both absolute and qualified. This court finds that plaintiffs' emotional distress claims are barred by the application of qualified immunity and therefore the defendants' motion to dismiss this action is granted.

To find qualified immunity for these governmental officials, it must be determined whether the conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 102 S.Ct. 2727, 2739 (1982). The issue then is whether the law at the time of the alleged violations clearly prohibited the conduct of the defendants. It must be concluded that the law did not so clearly provide.

The parties agree that the action taken by the Department of Health and Human Services was authorized by Congress. *See* Pub. L. No. 96-265 (1980). However, the date of implementing such a program was accelerated by the Administration. As the pleadings indicate, Congress desired to delay implementation in order to allow the state

agencies to hire and train sufficient personnel to handle the increased workload. *See* report entitled "Oversight of Social Security Disability Terminations" by the Senate Subcommittee on the oversight of Governmental Management at page 1. The President ordered the implementation of the program on March 1, 1981 rather than the January 1982 effective date proposed in the legislation.

The plaintiffs claim that it was knowingly improper to require the state review agencies to handle the increased case load. This court holds that it was not a violation of clear statutory or constitutional rights. The fact that the states were still ill equipped to handle the caseload well into 1982, as the plaintiffs state in their opposition papers, indicates that no relief is available. It appears that it is the failure of the states to provide the necessary personnel even well after the Congressional authorization would have taken effect, that caused a large portion of the delay asserted by the plaintiffs. At that point, it was clearly within the statutory duty of the defendants to have the state agencies review the caseload that they did. Relief is not appropriate on this ground as the courts will not intervene in the administrative procedures. *Heckler v. Day,* 104 S.Ct. 2249 (1984). The early implementation is then not sufficient to justify a *Bivens* type action for damages.

Plaintiffs also contend that the review procedures adopted by the defendants differed from standards imposed by the courts. The Secretary has in fact issued formal notice of non-acquiesence [*sic*] in decisions from the 9th Circuit. *See* Social Security Rulings 82-10c and 82-49c; *Patti v. Schweiker,* 669 F.2d 582 (9th Cir. 1982) and *Finnegan v. Mathews,* 641 F.2d 1340 (9th Cir. 1981).

The plaintiffs challenge the Secretary's ability to "non-acquiesce" [*sic*] in case law. Neither party has cited any cases to this court indicating that such policy is per se invalid. In fact, the courts have been reluctant to intervene in administrative procedures. See *Heckler v. Day, supra,*

(courts will not issue mandatory injunction requiring Social Security appeals to be resolved in 90-day statutory period); *Heckler v. Ringer,* 104 S.Ct. 2013 (1984) (exhaustion of administrative remedies required prior to judicial review).

Defendants' implementation of the review in fact occurred prior to the 9th Circuit rulings cited above. *Lopez v. Heckler,* 725 F.2d 1489 (9th Cir. 1984). Although the Constitution provides that the Courts shall be the interpreters of Federal Law, no case has been cited holding that non-acquiesence [*sic*] by the Executive branch is clearly invalid. This court notes that it is a common practice at other agencies such as the National Labor Relations Board and the Department of the Treasury in Internal Revenue matters. It cannot be concluded therefore that defendants' conduct, at the time it occurred initially, was clearly a violation of plaintiffs' statutory and constitutional rights so that a reasonable person would have acted otherwise. All defendants must therefore be protected by qualified immunity from damages relief as provided in *Harlow v. Fitzgerald, supra.*

Since there are no claims stated upon which any plaintiff may obtain relief, the case must be dismissed.

IT IS ORDERED that the defendants' Motion to Dismiss is granted.

DATED this 16th day of October, 1984.

/s/ ALFREDO C. MARQUEZ
Alfredo C. Marquez
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-2828
DC No. CIV 82-528 ACM

JAMES CHILICKY, DORA ADELERTE, AND SPENCER HARRIS, PLAINTIFFS-APPELLANTS,

v.

RICHARD SCHWEIKER, FORMER SECRETARY OF HEALTH AND HUMAN SERVICES; JOHN SVAHN, FORMER COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION; AND WILLIAM R. SIMS, DIRECTOR OF THE ARIZONA DISABILITY DETERMINATION SERVICE, IN THEIR INDIVIDUAL CAPACITIES, DEFENDANTS-APPELLEES.

[Filed Dec. 19, 1986]

JUDGMENT

Appeal from the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is affirmed in part, reversed in part and remanded.

A TRUE COPY
ATTEST DEC 16 1986

CATHY A. CATTERSON
Clerk of Court

by: /s/ OSCAR LAGLE
Oscar Lagle
Deputy Clerk

Filed and entered August 12, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2828
DC No. CIV 82-528 GLO ACM

JAMES CHILICKY, SPENCER HARRIS AND DORA ADELERTE, PLAINTIFFS-APPELLANTS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES; JOHN SVAHN, COMMISSIONER, SOCIAL SECURITY ADM.; AND WILLIAM R. SIMS, DIRECTOR, ARIZONA DISABILITY DETERMINATION SERVICE, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the District of Arizona

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[Filed Dec. 8, 1986]

ORDER

Before: BROWNING, SNEED, and HUG, Circuit Judges.

The panel, as constituted in the above case, has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-82-528-TUC-ACM

JAMES CHILICKY, ET AL, PLAINTIFFS,

v.

MARGARET HECKLER, DEFENDANTS.

[Filed Oct. 16, 1984]

JUDGMENT IN A CIVIL CASE

Before: ALFREDO C. MARQUEZ

☒ **Decision by Court.** This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of the defendants and against the plaintiffs.

Clerk: W. J. Furstenau
(By) Deputy Clerk

/s/ RENEE LUDEKE
Renee Ludeke

Date 10/16/84

APPENDIX F

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the

court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the orignial findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 205(h) of the Social Security Act, 42 U.S.C. (Supp. III) 405(h), provides:

Finality of Secretary's decision.

The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as

herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section[s] 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

U.S. GOVERNMENT PRINTING OFFICE: 1987 – 191-493/40309

OPPOSITION BRIEF

No. 86-1781

In The

Supreme Court of the United States

October Term, 1986

Richard Schweiker, ET AL., PETITIONERS

v.

James Chilicky, ET AL.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PARTIES TO THE PROCEEDING

Petitioners are Richard Schweiker, former Secretary of Health and Human Services; John Svahn, former Commissioner of the Social Security Administration; and William R. Sims, Director of the Arizona Disability Determination Service. Respondents are James Chilicky, Dora Adelerte, and Spencer Harris.

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RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents James Chilicky, Dora Adelerte and Spencer Harris hereby oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

1. Respondents are recipients of disability benefits paid under Title II or Title XVI of the Social Security Act of 1934, as amended.[1] All had regularly received benefits prior to 1980, when they underwent continuing disability reviews ("CDRs") conducted to determine whether they still met the disability requirements of federal law. As the petition for certiorari notes, the Arizona Disability Determination Service ("ADDS"), headed by Petitioner Sims, had immediate responsibility for both the CDRs and an initial decision on Respondents' continued medical eligibility under Title II or Title XVI. Petitioner Sims and his staff acted, however, at the continuing direction of federal administrators. See *Ellis v. Blum*, 643 F.2d 68, 70, 72, 75-76 (2d Cir. 1981).

This threshold review culminated in termination of Respondents' disability benefits. Respondents pursued available administrative remedies and won reinstatement of benefit payments.

They also filed suit against Petitioners alleging, *inter alia*, that Petitioners had knowingly conducted, directed or authorized a CDR process which resulted in initial benefit terminations without due process of law. In part, the Complaint indicated that these violations of the Fifth Amendment inhered in decisions by Petitioners Schweiker and Svahn to accelerate the CDR process, thus forcing the ADDS to dispose of far more cases than its staff could re-

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[1] The Petition adequately cites to all matters, also set forth herein, by referencing the accompanying appendices, which reproduce the opinions below.

view with minimal fairness to recipients. The Complaint also cited Petitioners' willful refusal to acquiesce in the law of the circuit, when conducting CDRs, as a further denial of due process.

The Court of Appeals correctly noted, however, that Respondents alleged additional violations of the Fifth Amendment in the course of CDRs, including:

1. Knowing use of unpublished criteria, rules and standards contrary to the Social Security Act.

2. Intentional disregard of dispositive evidence favorable to beneficiaries.

3. Purposeful selection of biased physicians and staff to review claims.

4. Imposition of quotas, requiring a minimum number of terminations regardless of the evidence in any given case.

5. Failure to review impartially adverse decisions.

6. Arbitrary reversal of favorable decisions.

7. Denial of benefits based on the type of disabling impairment.

8. Unreasonable delays in receiving hearings after termination of benefits.

The District Court dismissed all corresponding damage claims[2] on the ground that they were barred by Peti-

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[2] Respondents had previously withdrawn claims for declaratory and injunctive relief on behalf of a class of disability recip-

(Continued on following page)

tioners' qualified immunity from any such liability. In doing so, however, it expressly considered only the allegations of improper acceleration of the CDR process and nonacquiescence in the law of the circuit.

On appeal, the United States Court of Appeal for the Ninth Circuit affirmed dismissal of the aforementioned claims. It otherwise reversed the judgment below and remanded for further proceedings on the claims summarized in the eight numbered subparagraphs set forth above. The Court of Appeals therefore rejected Petitioners' challenge to personal jurisdiction in the District Court over the former Secretary of Health and Human Services and the Commissioner of Social Security. It further declined to accept their claim of qualified immunity without additional factual development. The Court of Appeals disagreed with Petitioners insofar as they denied jurisdiction over the subject matter, citing 42 U.S.C. §§ 405(g) and (h),[3] and argued that Congress intended to limit Respondents to the redress authorized by the administrative procedures they had already exhausted successfully. It necessarily rejected

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(Continued from previous page)

ients undergoing CDRs. Their remaining claims sought damages against Petitioners in their individual capacities, asserting that threshold deprivations of Respondents' benefits without due process had denied them food, shelter and other basic amenities, while causing them severe emotional distress.

[3] The Court of Appeals decided that the claims before it did not seek benefits because they had been restored to Petitioners. Rather, it reasoned, the claims were aimed solely at obtaining damages for emotional distress, uncompensated by a restoration of lost benefits, flowing from the original termination of Respondents' payments. Hence, the Court of Appeals concluded, the claims did not arise under the Social Security Act within the meaning of 42 U.S.C. § 405(h), and were not subject to its jurisdictional restrictions or to the provisions of 42 U.S.C. § 405(g).

Petitioners' claim that administrative hearings held after and necessitated by allegedly unconstitutional benefit terminations afforded all the process due Respondents.

The Court of Appeals denied Petitioners' Motion for Rehearing and suggestion for a rehearing *en banc*, which raised the question of subject matter jurisdiction over Respondents' damage claims.

THIS COURT SHOULD NOT GRANT THE PETITION

Respondents urge an unprecedented extension of *Bush v. Lucas*, 467 U. S. 367 (1983), relying specifically on 42 U.S.C. § 405(h) and little else. Historical considerations unique to administration of the federal civil service required denial of a *Bivens*[4] remedy in that case. Analogous factors are not present here, nor does § 405(h) compel the same result in this case.

Petitioners warn of countless damage actions, disrupting administration of virtually all social security programs, if the decision below remains undisturbed. The prediction is simply not warranted. Unless a recipient of disability benefits[5] uses prescribed administrative remedies to establish that an initial termination was substantively erroneous,

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[4] *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388 (1971).

[5] This case deals solely with the remedies open to persons who have received and are subsequently denied further disability benefits under Title II and XVI of the Social Security Act; 42 U.S.C. §§ 401 *et. seq.* and 1381 *et. seq.* Petitioners invite speculation on the effects of a *Bivens* remedy in the widely-varying circumstances of AFDC, Medicaid and other distinct programs operated under the aegis of the Social Security Act. This Court will doubtless decline the overture.

she can never obtain more than nominal damages in a *Bivens* action claiming an original deprivation without due process. *Carey v. Piphus*, 435 U.S. 247 (1978).

This principle provides an adequate safeguard against an avalanche of litigation proceeding without regard for the normal operation of the administrative process. Indeed, it positively encourages pursuit of administrative remedies as an essential predicate to any *Bivens* action a recipient might plausibly choose to maintain.

Furthermore, success in the administrative arena merely wins reinstatement of modest benefit payments. An inordinate number of severely-disabled persons, dependent on subsistence incomes regained only through a contest with the SSA bureaucracy, will scarcely have the wherewithal to sue its representatives in an outpouring of subsequent *Bivens* actions.

Petitioners characterizes the damage claims in this case as bordering on the frivolous, apparently because Respondents eventually did regain benefits through the administrative process. The implication that they can no longer point to any uncompensated losses, entitling them to damages, is untenable. *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) (unconstitutional termination of benefits may inflict losses that simply cannot be compensated through a retroactive award after an administrative hearing).

This Court should decide the instant petition on its own merits, rather than postponing its consideration until it rules on the petition pending in *Cooper v. Kotarski*. The question presented in *Kotarski* deals with application of *Bush* to a *Bivens* claim based on disciplinary action against

a probationary federal employee. It merely invites further consideration of the *Bush doctrine* in its traditional setting. Whatever the disposition, it cannot aid materially in determining whether *Bush* should control in the far different context of social welfare programs.

1.a. The litigation in *Bush* implicated three competing interests, each of considerable significance in itself. The Federal Government depends, for its very functioning, on a loyal, efficient and well-disciplined civil service. These underpinnings are inevitably weakened if civil servants can pursue a *Bivens* remedy against their superiors. The judicial process affords a limited, unsatisfactory means of determining the ultimate impact on the Government's own functioning. *Bush*, 462 U.S. at 388-89.

Conversely, adequate protection for the constitutional rights of personnel forming a vast national workforce remains a paramount concern in a society dedicated to basic civil liberties for all citizens. Neither loyalty, morale nor efficiency thrives if civil servants are remediless in the face of adverse employment action flouting those guarantees. *Bush*, 462 U.S. at 382-86. Such considerations become especially significant where, as in *Bush* itself, their exercise of First Amendment rights animates personnel disputes. The public interest in learning the truth about governmental affairs peculiarly within the knowledge of civil servants may suffer real damage, if federal employees are silenced by untoward and unchecked sanctions. *Id.*, 462 U.S. at 390-91 n. 37.

Congress has recognized the necessity for delicate, but comprehensive, adjustments among these unusually important national interests, which remain in constant ten-

sion. Over the last century, Congress has repeatedly sought to regulate them in increasingly complete and detailed fashion. In doing so, it has gradually shifted the balance toward greater protection for the constitutional rights of civil servants confronting employer discipline. The process has culminated in administrative remedies that restore injured employees to the positions they would otherwise have occupied, as nearly as agency forums permit. *Id.*, 462 U.S. at 381-88; see also 462 U.S. at 390-92 (Marshall J., with whom Blackmun, J., joins, concurring).

Judicial introduction of a *Bivens* remedy into the midst of these elaborate, continuing and delicate efforts at Congressional regulation would have unsettling consequences the courts cannot readily appreciate nor accurately assess. Officials facing a threat of personal liability in protracted damage actions would doubtless feel a chilling effect on their future exercise of disciplinary authority, however justifiable their subsequent conduct. *Id.*, 462 U.S. at 388-89. That prospect is especially great where they might retain a continuing employment relationship with potential litigants. Congress remains in the best position to judge such possibilities, evaluate their potential harm to the Government's own functioning, and act accordingly, based on its considerable experience in the area. *Id.*

Bivens recognized that similar considerations might constitute a special circumstance in which judicial approval of damage remedies would invade a domain properly reserved for the legislature. *Id.*, 403 U.S. at 396, citing *United States v. Gilman*, 347 U.S. 507 (1954) and *United States v. Standard Oil Co.*, 332 U.S. 301 (1947). Resolution of the claims in both *Gilman* and *Standard Oil* ultimately turned on the nature and significance of juridical relationships between the United States and its employees. Congress had the demonstrable, paramount interest as well as expertise in regulating them, and in determining whether a breach of their attendant legal duties should be answerable in damage actions. *Bush*, 462 U.S. at 378-80, citing *Bivens*, *supra* and emphasizing that its references to *Gilman* as well as *Standard Oil* foreshadowed the principles, if not the result, handed down in *Bush* itself.

Bivens neither cited nor alluded to any sphere of federal activity, outside Government employment, presenting special circumstances in which the damage remedy it broadly sanctioned might prove unavailable, as a matter of sound judicial deference to Congress. *Id.*, 403 U.S. at 395-96. *Bush* represented the logical application of doctrines canvassed in *Bivens*. It did not inaugurate a retreat from the principle that *Bivens* remedies are the norm, rather than the exception, where federal officials commit constitutional torts. See, e.g., *Bush*, 462 U.S. at 377-78, citing *Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* remedy lies against federal employees even if injured party may sue the Government itself for damages caused by the same tortious conduct). In short, this Court has never yet precluded nor warned against a *Bivens* remedy outside the minutely-regulated, peculiarly-sensitive context provided by the Government's relations with its own employees.

b. Petitioners' attempts to draw a close analogy between the considerations operative here and in *Bush* do not succeed in raising a substantial question of federal law. Their reliance on *Heckler v. Day*, 467 U.S. 104, 111-18 (1984) is misplaced because it ignores the narrow focus

of the decision. *Day* originated as a challenge to delays in processing disability benefit claims through the administrative appellate process. *Id.*, 467 U.S. at 110-11. *That* was the particular problem which had "inspired almost annual Congressional debate." *Id.*, 467 U.S. at 112.

Such continued legislative attention to it proved significant simply because it revealed Congressional intent with unusual clarity: Congress had repeatedly considered but expressly rejected measures establishing mandatory deadlines for claims adjudications. *Id.*, 467 U.S. at 111, 117-18 and n.30. Where Congress consistently focuses on deficiencies in one facet of agency operations it has ample power to address, but regularly withholds a particlar, proposed remedy, the judiciary should not act in its stead by ordering the very steps the legislature has explicitly rejected. *Id.*, 467 U.S. at 119.

Congress has never grappled, over and again, with the extent to which the administrative process adequately compensates individuals for all losses caused by wrongful termination of their disability benefits. The legislature has never deliberated on any form of redress except eventual reinstatement of payments, coupled with an award of benefits denied in the interim. Provisions to that effect appeared in the legislation creating the disability benefit programs now at issue. They have not occupied Congressional attention at any subsequent time. They have certainly not attracted continuing debate, demonstrating an affirmative Congressional intent to foreclose any additional redress for the victims of unlawful terminations.

Petitioners cite recent amendments to the Social Security Act affecting operation of agency appeal procedures

in termination cases. See, e.g., 42 U.S.C. (Supp. III) § 423 (g). They analogize them to the constant, close regulation Congress has pursued in adjusting relations between the Government and its civil servants. The amendments on which they rely merely seek to minimize the incidence of erroneous terminations. If they succeed in furthering that objective, they will reduce the potential for *Bivens* actions alleging that agency officials terminated benefits without due process of law.

The amendments do not, however, reflect continuing Congressional oversight of the compensation individuals should receive in either administrative or judicial forums, if they are nonetheless denied property interests through agency action violating the Fifth Amendment. *Bush*, by contrast, turned on the fact that Congress had expressly considered and then decided, in comprehensive terms, every specific form of redress the administrative process had to afford victims of unconstitutional acts provable in agency adjudications themselves.

c. The Federal Government does not maintain juridical or other relationships with disability recipients remotely similar to those obtaining between the United States and its civil servants. It obviously does not depend, for its own functioning, on constant, fine adjustments in its dealings with severely-disabled citizens. Those transactions are largely matters of bureaucratic routine. Once the Social Security Administration finds applicants eligible for benefits, it simply sends them periodic payments in prescribed amounts until they no longer meet the relatively few requirements of substantive law.

Recipients do not continuously render services or any other performance to the Government, which might lead to the complex disputes reflected in the convoluted administrative and judicial proceedings at issue in *Bush*, 462 U.S. at 369-72. The public interest in civil service regulations protecting valuable sources of information on national affairs has no analog in the present context. Hence, Congress need not resort to repeated, intricate adjustments among governmental, individual and public interests, which it may deem best served by the fullest possible administrative redress for unconstitutional acts jeopardizing all three.

Congress has not in fact done so, even where, as here, the Government periodically evaluates the continued medical eligibility of SSA recipients and terminates any it then finds unqualified for the program. The legislature has merely established and, occasionally, extended certain safeguards against erroneous cessations. It has never specifically addressed the separate question of the redress due victims of unconstitutional deprivations. They may obtain lost payments through an administrative appeal, but exactly the same procedure is open to any terminated recipient who was not victimized by unconstitutional acts. Hence, the remedy simply cannot embody a Congressional determination of the only redress appropriate in cases such as that at bar.

Allowance of a *Bivens* remedy does not upset any balance of interests struck by this scheme: A terminated recipient who fails to re-establish eligibility through its mechanisms cannot recover more than nominal damages for any deprivation inflicted without due process. *Carey v. Piphus*, *supra*. If it has any effect in this particular instance, a

Bivens remedy actually encourages terminated recipients to pursue the one force of administrative redress Congress has considered, *before* they can assert any substantial basis for a damage action. In *Bush*, by contrast, a *Bivens* remedy for First Amendment violations appeared an immediate, attractive alternative to lengthy administrative proceedings: The potential recovery on such a claim did not depend upon a prior agency adjudication determining that adverse employment action was unjustified.

According to the Government, the SSA administrative scheme also affords Respondents adequate compensatory relief for any deprivations they have suffered. See *Bush*, 462 U.S. at 388. Indeed, Petitioners imply that their opponents lack any real damages precisely because they prevailed in the administrative appellate process. In fact, those procedures merely enable a wrongfully-terminated recipient to regain benefits that should never have been denied him in the first place. Their loss certainly does not represent the only harm individuals suffer when government officials deprive them of property interests without due process. *Carey*, 435 U.S. at 262-64 and n. 20 (damages for emotional distress, including mental suffering or emotional anguish, recoverable when caused by unjustifiable deprivation accomplished without due process).

Petitioners do not claim that this principle is inapplicable in *Bivens* actions. They do not deny that a benefit cut-off represents an objective, quantifiable injury, separate and distinct from subjective distress attributable to the same unconstitutional action. *Carey*, 435 U.S. at 262-64.

Unlike the petitioner in *Bush*, 462 U.S. at 386, Respondents could not present their constitutional claims to

agency adjudicators. Hence, Congress has never had occasion to determine whether SSA administrative remedies afford the fullest manageable redress for all injuries flowing from the unconstitutional acts of Government officers. The legislature could not possibly have made a judgment, now entitled to judicial deference, that the optimum possible redress is available in agency forums.

Petitioners warn that a *Bivens* remedy will deter federal officials from properly discharging their duties in continuing disability investigations. The Government thus draws another unpersuasive parallel to *Bush*. Officials responsible for disciplinary action against a civil servant claiming a denial of her constitutional rights must appear and defend their conduct in trial-type administrative proceedings. *Id.*, 462 U.S. at 386-88. If that already substantial obligation were accompanied by a need to defend *Bivens* suits, the cumulative burden on administrators might well deter them from proper disciplinary action in future cases. *Id.*, 462 U.S. at 388.

The administrative process governing adjudication of disability benefit claims is non-adversarial, by design. Agency officials responsible for benefit termination need not appear at any stage to defend, present evidence on or argue in support of their decisions. The first and only occasion on which they might have to do so would arise in a *Bivens* action itself. This Court has never credited the notion that a *Bivens* remedy should be denied because the mere obligation to defend the litigation might chill forthright administrative action in future encounters with the same subject matter.

In sum, Petitioners fail to establish any special circumstances, within a tenable reading of this Court's precedents, counseling against a judicial grant of the *Bivens* remedy Respondents obtained.

d. According to Petitioners, Congress has, however, expressly declared its intent to limit Respondents to the redress afforded by the administrative process. They rely on 42 U.S.C. §§ 405(g) and (h), read against a few decisions of this Court.

Petitioners do not invoke either provision to mount a direct, unqualified attack on subject matter jurisdiction over *Bivens* claims. Rather, they deem the jurisdictional concerns of §§ 405(g) and (h) plainly indicative of a Congressional intent to foreclose all damage claims traceable to benefit terminations.

Petitioners note that the second sentence of § 405(h) shields the Secretary's findings of fact and decisions from any form of review, except that provided elsewhere in § 405. Section 405(g) sets forth the permissible means of obtaining such review. Since § 405(g) merely contemplates proceedings for restoration of lost benefits, Congress must have intended that as the sole, permissible redress for terminations, whatever their actual consequences.

The second sentence of § 405(h) clearly refers to the first. See *Weinberger v. Salfi*, 422 U.S. 749, 757-58 (1975). The opening sentence, in turn, restricts the scope of the second to "findings and decisions *of the Secretary after a hearing.*" Emphasis supplied. Respondents, however, never disputed the findings or decisions reached in their cases after administrative hearings. Rather, their *Bivens* claim arose from the initial actions of state officials in summarily terminating their benefits and forcing them to seek Secretarial hearings, subject to the extraordinary de-

lays recounted in *Day*, 467 U.S. at 111-18 and acknowledged as constitutionally significant in *Mathews v. Eldridge*, 424 U.S. at 341-42. Those actions did not amount to the Secretary's findings or decisions after any hearing within the contemplation of § 405(h). See *Weinberger v. Salfi*, 422 U.S. at 764-67.

This Court need not decide whether Petitioners' combined reading of *Bush* and § 405(h) might have some colorable appeal in a setting other than that now before it. The argument simply does not demonstrate that Congress intended to bar all relief, except benefit restorations, where the Secretary's state delegates lawlessly[6] extinguish entitlements with the conscious approval of the Secretary and the Commissioner.

The Court of Appeals permitted maintenance of a corresponding *Bivens* action under 28 U.S.C. § 1331. That, Petitioners contend, flouts other provisions of 42 U.S.C. §§ 405(g) and (h), which must, therefore, be read as a Congressional prohibition against *Bivens* remedies.

In part, they attack the Circuit's allowance of § 1331 jurisdiction as an open invitation to bypass administrative remedies at the core of the adjudicatory scheme. As Respondents have shown, a *Bivens* claim based on due process violations lacks any tangible value unless a disability recipient not only exhausts SSA administrative remedies, but prevails at the conclusion of the process, *before* prosecuting a damage action.

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[6] E.g., by deliberately failing to follow the procedures required by due process before an oral evidentiary hearing on an ensuing termination, as set forth in *Eldridge*, 424 U.S. at 332-47.

The Government relies primarily on *Heckler v. Ringer*, 466 U.S. 602 (1984) to support its reading of the interplay between 42 U.S.C. § 405(h) and 28 U.S.C. § 1331. *Ringer* (466 U.S. at 615-16) construed 42 U.S.C. § 1395ii, the Medicare provision incorporating the third sentence of § 405(h). According to Petitioners, *Ringer* established that litigants cannot evade the strictures of § 405, by pleading constitutional infirmities in the methods used to determine benefit claims, and thus invoke federal question jurisdiction. The Government concludes that Respondents have resorted to that very technique in presenting their *Bivens* claims.

Petitioners, however, do not even cite *Bowen v. Michigan Academy of Family Physicians*, — U.S. —, 106 S. Ct. 2133 (1986). There, physicians challenged Medicare regulations differentiating the benefit amounts payable for similar professional services. They claimed, in part, that the rules violated the Fifth Amendment. The Sixth Circuit held and, on remand, reaffirmed that 28 U.S.C. § 1331 provided jurisdiction over the subject matter, notwithstanding this Court's decision in *Ringer*. *Id.*, 106 S. Ct. at 2135.

Citing *Weinberger v. Salfi*, 422 U.S. at 756-62 and *Ringer, supra*, the Government argued that 42 U.S.C. § 405(h) "prevents any resort to the grant of general federal question jurisdiction contained in 28 U.S.C. § 1331." *Michigan Academy*, 106 S. Ct. at 2140; footnote omitted. This Court rejected that absolute view. In creating the Medicare program, Congress had clearly manifested an intent to preclude judicial review of administrative decisions fixing individual benefit amounts. It had not expressed an equally clear intent to bar parties from obtaining review where they presented "substantial . . . constitutional challenges to the Secretary's administration of Part B of the

Medicare program." *Id.*, 106 S. Ct. at 2144; footnote omitted.

The fact remains that *Ringer* (466 U.S. at 607-609) also arose from a constitutional challenge to a Secretarial policy prohibiting certain Medicare reimbursements. This Court then held that 42 U.S.C. § 1395ii must be construed and applied in exactly the same manner as 42 U.S.C. § 405(h). It followed that § 1331 jurisdiction did not lie over claims indistinguishable from those at issue in *Michigan Academy*. *Ringer*, 466 U.S. at 615-16. In *Michigan Academy*, 106 S. Ct. at 2141, the Court avoided a result *Ringer* apparently mandated by simply noting that while § 1395ii was modeled on § 405(h), the two provisions are adapted to different statutory schemes. Nothing in *Ringer* suggested such a ready means of distinguishing the effect each has on § 1331 jurisdiction, especially in the same operative circumstances.

The conclusion that "*Michigan Academy* . . . severely restricted the decision in *Ringer*" seems inescapable. *Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 38 (3rd Cir. 1986). It is even more doubtful that *Ringer*, a case ultimately dealing with the jurisdictional consequences of § 1395ii, remains a leading pronouncement on the extent to which § 405(h) forecloses § 1331 jurisdiction. That is especially true where an action brought under § 1331 challenges routine methods of determining benefit claims. Petitioners' *Bivens* claims, like those presented in *Michigan Academy*, had precisely that foundation.

In any event, neither *Ringer* nor such antecedents as *Weinberger v. Salfi* and *Mathews v. Eldridge* assist Petitioners' reading of § 405(h) and § 1331. As *Salfi* (422 U.S. at 760-61) observed, the ultimate objective of litigation in this area[7] is ordinarily receipt of social security benefits. Since accompanying constitutional claims are merely designed to remove a legal impediment to an award, they "arise under" Title II of the Social Security Act, within the meaning of § 405(h). *Id.* In cases typified by *Eldridge* (424 U.S. at 331), continued receipt of benefits is the ultimate purpose behind the action. There, however, the plaintiffs attack administrative procedures on the ground that they unlawfully impair their ability to preserve uninterrupted benefit payments. *Id.* Because acquisition of benefits is still the paramount goal prompting the litigation, such constitutional claims also "arise under" Title II: But for the underlying interest in maintaining or protecting an SSA entitlement, they would never be tendered. *Id.*; *accord*, *Ringer*, 466 U.S. at 614-15.

That is simply not this case. Respondents lacked any tangible interest in maintaining *Bivens'* claims based on due process violations until they had re-established their entitlement to continued benefits. At that juncture, all

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[7] *Ringer* included—see 466 U.S. at 614-15. The injury ensuring that the *Ringer* respondents had standing to bring their constitutional claims was the unresolved denial of Medicare benefits each had unsuccessfully sought at the initial stages of the administrative process. *Id*, 466 U.S. at 615-16. In the instant case, Respondents did not have standing to maintain a *Bivens* action because they remained without benefits when they undertook prosecution of damage claims. They had regained their entitlements. The injuries conferring standing to pursue a *Bivens* remedy consisted of such harm as the uncompensated emotional distress Respondents had suffered through the original benefit terminations. Hence, the Court of Appeals correctly held that their constitutional claims did not arise under Title II, as *Ringer* itself construed the scope provision of § 405(h).

efforts at winning benefits, whether by overcoming some impediment to their receipt, or by eliminating obstacles to adequate protection of uninterrupted payments, were necessarily at a complete end. Respondents' sole objective was an award of damages compensating them for such injuries as emotional distress, occasioned by a deprivation of benefits they had already reversed. Nothing in *Ringer*, *Salfi* or *Eldridge*[8] supports the notion that corresponding claims arose under Title II. Rather, those cases analyzed the "arising under" proviso based on a premise—receipt of benefits remains the ultimate unachieved goal of constitutional litigation—that could not obtain in this *Bivens* action.

2. Even if the Court grants the petition in *Kotarski*, the ultimate disposition of the case will have little, if any, significance here. Presumably, the Government thinks otherwise because the Court might not only grant it, but hold that even though a probationary federal employee lacks the administrative remedies discussed in *Bush*, he is still without a *Bivens* remedy for unconstitutional injuries to his employment interests. Petitioners would undoubtedly analogize his circumstances to those of Respondents: They, too, could not seek redress for emotional distress, stemming from deprivations of property without due process, in the only administrative forum open to them. Congress intended that result and no other in both instances, or so Petitioners will apparently argue.

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[8] Expressly noting, in fact, that a due process claim can be maintained *de novo* in District Court, even if it was not previously raised in the course of fully exhausting administrative remedies. *Eldridge*, 424 U.S. at 329 n. 10, citing to *Flemming v. Nestor*, 363 U.S. 603 (1960).

Assuming that this extended line of conjecture is sound, such developments in *Kotarski* will have little consequence for the instant case. They would merely affirm that as *Bush* concluded, Congress has repeatedly considered all conceivable questions touching on the redress due any federal employee claiming unconstitutional mistreatment at the hands of his superiors. Its decision not to afford particular redress for probationary employees should again enjoy judicial deference. The history of the social security program does not include similar legislative attention to the redress properly due terminated disability recipients, especially where they are denied constitutional rights by initial agency action extinguishing longstanding entitlements.

Respondents respectfully submit that this Court should rule on the instant petition without regard to any action it may take in Kotarski.

CONCLUSION

After successfully exhausting administrative remedies, Respondents sought damages under *Bivens* for unredressed injuries flowing from a threshold denial of continued benefits. This Court has never indicated that such a claim runs afoul of either the doctrine enunciated in *Bush* or proper administration of 42 U.S.C. §§ 405(g) and (h). Nothing in the applicable statutory scheme, as amended, supports Petitioners' reliance on *Bush*, nor do its provisions otherwise bar a *Bivens* remedy here.

At bottom, the Government is arguing that its representatives may direct initial benefit terminations, flout the due process requirements *Eldridge* (424 U.S. at 332-47) contemplated prior to an oral hearing on the deprivations, and still remain unaccountable for every ensuing injury, other than eventual restoration of benefits to those victims who persevere in regaining the very property they should never have lost. It would require far more persuasive evidence than Petitioners adduce to conclude that Congress affirmatively approved or desired such untoward results, especially in fashioning a program of income maintenance for dependent, severely-disabled citizens.

Respondents request that the Court deny certiorari in the instant case.

Respectfully submitted,

SOUTHERN ARIZONA LEGAL AID, INC.

/s/ WILLIAM E. MORRIS
William E. Morris
Attorney for Respondents

June 1987

PETITIONER'S

BRIEF

No. 86-1781

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD SCHWEIKER, ET AL., PETITIONERS

v.

JAMES CHILICKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits.

PARTIES TO THE PROCEEDINGS

The petitioners are Richard Schweiker, former Secretary of Health and Human Services; John Svahn, former Commissioner of Social Security; and William R. Sims, Director of the Arizona Disability Determination Service. Respondents are James Chilicky, Dora Adelerte, and Spencer Harris.*

* In the original complaint there were, besides respondents, seven other plaintiffs. These seven, who did not pursue the appeal to the Ninth Circuit, were Atanacio Alamanza, Arthur Flynn, Donald Bond, Demitrio Higuera, Joseph Tellez, Bonnie Bircher, and Connie Diaz.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 796 F.2d 1131. The opinion of the district court (Pet. App. 15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on August 12, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on December 8, 1986 (Pet. App. 21a-22a). On February 27, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including May 7, 1987, and the petition was filed on May 6, 1987. The petition for a writ of certiorari was granted on October 5, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

> Judicial review.
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in

> conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 205(h) of the Social Security Act, 42 U.S.C. (Supp. III) 405(h), provides:

> Finality of Secretary's decision.
>
> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No find-

> ings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

STATEMENT

This is a *Bivens* suit brought by three recipients of Social Security disability benefits whose benefits were terminated pursuant to disability reviews conducted by the Social Security Administration. The benefits of all three respondents were fully restored during administrative review or on a subsequent application for new benefits. Respondents nonetheless seek personal damages from the former Secretary of Health and Human Services and two other high-level officials for alleged due process violations in the handling of their claims.

A. The Statutory and Regulatory Framework

The Federal Government provides benefits to disabled persons under two distinct programs administered by the Social Security Administration (SSA). Title II of the Social Security Act provides for the payment of disability insurance benefits to persons who have contributed to the program and who suffer from a mental or physical disability. 42 U.S.C. (& Supp. III) 423. Disability benefits are also payable to indigent disabled persons under the Supplemental Security Income (SSI) program established by Title XVI of the Act, 42 U.S.C. (& Supp. III) 1382(a). See generally *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 1-2. Under both programs, a person is considered disabled if, because

of a physical or mental impairment, he is unable to do his previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy." 42 U.S.C. (& Supp. III) 423 (d)(2)(A), 1382c(a)(3)(B).

The disability programs administered under Titles II and XVI "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). "Approximately two million disability claims were filed under these two titles in fiscal year 1983." *Heckler* v. *Day*, 467 U.S. 104, 106 (1984). In fiscal year 1987, an estimated 1.3 million new claimants sought benefits under Title II, and 1.49 million sought disability benefits under Title XVI. It was further estimated that approximately 7 million persons would be receiving disability benefits under the two titles as of September 30, 1987. See SSA 1987 Ann. Rep. to the Congress 29, 31 (1987). The Secretary of Health and Human Services has promulgated detailed regulations governing the procedures for the adjudication of claims for benefits. In addition, Congress has mandated continuing review of those persons receiving benefits who are not permanently disabled to ensure their continued eligibility.

1. *Procedural Provisions*

"To facilitate the orderly and sympathetic administration of the disability program[s] * * * the Secretary and Congress have established an unusually protective * * * process for the review and adjudication of disputed claims." *Heckler* v. *Day*, 467 U.S. at 106. If it is determined at any stage of this process that the individual is eligible for benefits (and if he has not been receiving benefits), he is entitled to retroactive payments for the entire period of his eligibility, up to 12 months prior to his initial

application. See *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976).

a. Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary through SSA. 42 U.S.C. (& Supp. III) 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903. See *Mathews* v. *Eldridge*, 424 U.S. at 335; *Heckler* v. *Day*, 467 U.S. at 106. The state agency renders an initial determination on the basis of its consideration of an application submitted by a person seeking benefits for the first time. See *Mathews* v. *Eldridge*, 424 U.S. at 337-338.

b. If the state agency initially determines that a new applicant is not disabled, the individual may request a de novo reconsideration by the state agency. 20 C.F.R. 404.904, 404.907-404.921, 416.1404, 416.1407-416.1421. Governing regulations provide—and the claimant is personally notified—that the adverse initial determination becomes "binding" if he does not request reconsideration within 60 days of his receipt of the adverse initial determination. 20 C.F.R. 404.904, 404.905, 404.909(a)(1), 416.1404, 416.1405, 416.1409(a).[1]

c. Under 42 U.S.C. (& Supp. III) 421(d), if an individual is dissatisfied with the decision by the state agency after its initial determination and reconsideration of the claim, he "shall be entitled to

[1] The Secretary has not provided for a separate state-agency reconsideration stage in disability cessation cases under Title XVI. An SSI recipient therefore may proceed directly to an ALJ hearing if he requests one within 60 days of the initial determination. 20 C.F.R. 416.1407, 416.1415.

a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. (& Supp. III) 405(b)]." See also 42 U.S.C. 1383(c)(1); 20 C.F.R. 404.944-404.965, 416.1429-416.1465. The Act requires—and the claimant is personally notified—that the state agency's decision becomes binding upon the claimant if he does not request such a hearing within 60 days of his receipt of the state agency's determination. 42 U.S.C. (& Supp. III) 405(b)(1); 42 U.S.C. 1383(c)(1); 20 C.F.R. 404.920, 404.921, 404.933(b), 416.1404(b)(3), 416.1405, 416.1420, 416.1421, 416.1433(b).

The evidentiary hearing is conducted by an administrative law judge (ALJ) within SSA's separate Office of Hearings and Appeals (20 C.F.R. 404.929, 416.1429, 422.201 *et seq.*). The ALJ is directed to "look[] fully into the issues" (20 C.F.R. 404.944, 416.1444). See *Heckler* v. *Campbell*, 461 U.S. 458, 469 n.12 (1983). Either the claimant or the ALJ may develop new evidence or raise new issues that were not presented to the state agency, and the claimant or his representative has a right to make an oral or written statement regarding the facts and applicable law. 20 C.F.R. 404.929, 404.944, 404.946, 404.949, 404.950, 416.1429, 416.1444, 416.1446, 416.1449, 416.1450. In rendering his decision, the ALJ must follow SSA's published regulations and formal Social Security Rulings (20 C.F.R. 422.408), but he is not bound by the Programs Operations Manual System and other instructional material that SSA furnishes to the state agencies to guide them in their preliminary evaluation of disability claims. See *Heckler* v. *Ringer*, 466 U.S. 602, 607-608 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 18-19 (1984); H.R. Rep. 98-618, 98th Cong., 2d Sess. 20-22 (1984).

d. If the decision by the ALJ after a hearing under either Title II or Title XVI is adverse to the claimant, he then may seek review by the Appeals Council in SSA. 20 C.F.R. 404.967-404.983, 416.1467-416.1483. Governing regulations provide—and the claimant is once again personally notified—that the adverse ALJ's decision becomes binding if the claimant does not seek Appeals Council review within 60 days or such further period as the Secretary permits. 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468.

e. The Appeals Council's denial of review or decision on the merits constitutes the Secretary's "final decision" on the individual's claim for benefits. At that point, the Act and implementing regulations provide for the claimant to seek judicial review in federal district court, pursuant to 42 U.S.C. 405(g). See 42 U.S.C. (& Supp. III) 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210. Section 405(g) requires that the claimant seek such review "within sixty days after the mailing to him of notice of [the final] decision or within such further time as the Secretary may allow," and the notice of the Appeals Council's decision informs the claimant of this requirement. See 20 C.F.R. 404.982, 416.1482 (Secretary may extend time for filing for good cause shown). If judicial review is not sought within the time allowed, the Appeals Council's decision (or the ALJ's decision, if the Appeals Council denied review) is expressly made binding upon the claimant. 20 C.F.R. 404.981, 404.982, 416.1481, 416.1482.

f. Although an adverse decision at any step of the administrative process becomes binding upon the claimant if he does not seek further review within

the time allowed, the Secretary has provided by regulation that such a decision may be reopened within 12 months of the initial determination for any reason, within either two or four years for good cause, and at any time if the decision was obtained by fraud or similar fault. 20 C.F.R. 404.987-404.989, 416.1487-416.1489. However, the Secretary's denial of a request to reopen is not subject to administrative or judicial review. 20 C.F.R. 404.903(*l*), 416.1403(a)(5). See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

2. *Continuing Disability Review*

An individual who is found to be disabled under either Title II or Title XVI is entitled to benefits only for as long as he continues to be disabled under the statutory definition of disability. 42 U.S.C. (& Supp. III) 423(a)(1), 425, 1381a; 20 C.F.R. 404.1594, 404.1597, 416.994, 416.1331(b). Prior to legislation enacted in 1980 (effective January, 1982), however, "[a]dministrative procedures * * * provide[d] that a disability beneficiary's continued eligibility for benefits be reexamined only under a limited number of circumstances." H.R. Conf. Rep. 96-944, 96th Cong., 2d Sess. 60 (1980). The 1980 legislation sought to ensure that only those qualified received payments by amending Title II of the Social Security Act to require that, "except * * * where a finding has been made that [a claimant's] disability is permanent," "the case shall be reviewed * * * for purposes of continuing eligibility, at least once every 3 years * * *." Pub. L. No. 96-265, § 311(a), 94 Stat. 460, codified at 42 U.S.C. (& Supp. III) 421(i). Notwithstanding the January 1, 1982, statutory effective date of this continuing disability re-

view (CDR) program (42 U.S.C. 421 note), the Secretary began the CDR process in March, 1981 (Pet. App. 2a; H.R. Rep. 98-618, *supra*, at 10).[2]

a. When an individual's case is reviewed he bears the burden of showing, "by means of 'medically acceptable clinical and laboratory diagnostic techniques,'" that he continues to have a physical or mental impairment of sufficient severity to satisfy the statutory standard of disability. *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976) (quoting 42 U.S.C. 423(d)(3)). The individual is first notified by the state that his case has been selected for review and is requested to furnish information about his current medical condition and the identity of his treating physician. 20 C.F.R. 404.1593, 416.993. If the state agency then makes a tentative determination that his disability has ceased, the individual is given an advance written notice and explanation and is informed that he has 10 days within which to submit any additional information. 20 C.F.R. 404.1594-404.1595, 416.994. After this 10-day period and the receipt of any further evidence, the state agency makes its initial determination. See *Mathews* v. *Eldridge*, 424 U.S. at 337-338 (describing continuing-eligibility investigation process as it existed before the 1980 amendment). Once the state has made an initial determination that a recipient is no longer disabled, the process of administrative and judicial review follows, with certain exceptions, the same path as that for new claimants.

[2] Although the CDR program only applied directly to Title II claimants, many persons were receiving benefits under both the Title II insurance program and the Title XVI SSI program and, thus, were subject to reviews that examined their eligibility under both programs.

b. The CDR process generated considerable controversy because of the high number of state determinations that individuals had ceased to be disabled and the high percentage of subsequent reversals of those determinations. "In the early stages of the continuing disability investigation (CDI) review process," the Senate Finance Committee in 1982 found that, "while reviews have been focused on cases most likely to be found ineligible, States have been terminating benefits in approximately 45 percent of the cases reviewed. Of those cases which appeal, approximately 65 percent have benefits reinstated by an administrative law judge." S. Rep. 97-648, 97th Cong., 2d Sess. 6 (1982).[3]

From the commencement of the CDR process in 1981, the Secretary had assured compliance with *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in the need-based Title XVI program by allowing an SSI recipient to elect to continue to receive benefits from the date of the state agency's determination that he no longer is disabled until the ALJ has rendered his

[3] The Senate Report provided some explanation for this high reversal rate: "This wide variation between the decisions made by State agencies and ALJs, a long recognized problem, stems from a number of factors. For example, the beneficiary can introduce new medical evidence at the ALJ hearing; the ALJ hearing is the first face-to-face contact between the reviewed beneficiary and a decision-maker; and the standards of disability used by State agencies and ALJs differ in some important respects." S. Rep. 97-648, *supra*, at 6. See also *id.* at 21 (Additional Views of Sen. Long): "While this is a very high reversal rate, it is not strikingly different from the administrative law judge reversal rate in prior years, nor from the administrative law judge reversal rate of initial claims. * * * Most reversals are due to the application of easier eligibility standards [by the ALJs]."

decision following a hearing. 20 C.F.R. 416.1336(b). But in view of the Court's decision in *Mathews* v. *Eldridge*, 424 U.S. at 349, that the Due Process Clause does not require the Secretary to continue non-need-based Title II payments until the individual has had an opportunity for an ALJ hearing, no similar protection was provided to Title II beneficiaries. Rather, at the time the CDR process was begun, Title II benefits were terminated effective two months after the month in which the recipient ceased to be disabled, regardless of the recipient's pursuit of administrative or judicial review. 42 U.S.C. (& Supp. III) 423(a). See *Mathews* v. *Eldridge*, 424 U.S. at 338; H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 33 (1984). Thus, during the pendency of their administrative appeals, Title II beneficiaries were without benefits.[4]

Concluding that "some emergency relief" was warranted (S. Rep. 97-648, *supra*, at 6), Congress enacted legislation, the Act of Jan. 12, 1983, Pub. L. No. 97-455, 96 Stat. 2497, making temporary provision for Title II claimants to continue to receive benefits following the state agency's termination decision, pending receipt of the ALJ's decision, and subject to recoupment if the ALJ affirms the state agency's determination. Pub. L. No. 97-455, § 2, 96 Stat.

[4] As a general rule, however, an individual's disability was not found to have "ceased" until the month in which the agency made the "no disability" determination. Thus, terminated recipients generally enjoyed two months of continued benefits, whether or not they pursued their administrative remedies. See S. Rep. 97-648, *supra*, at 6 ("As an administrative practice, individuals are now generally found to be 'not disabled' no earlier than [the] month in which the agency makes the termination decision.").

2498, codified at 42 U.S.C. (& Supp. III) 423(g).[5] Congress also provided that following the initial determination by the state that a recipient is no longer disabled, the state must provide a face-to-face hearing on any motion for reconsideration. § 4, 96 Stat. 2499-2500, codified at 42 U.S.C. 405(b)(2). See 20 C.F.R. 404.917.

At the same time, Congress eliminated the requirement that beneficiaries with nonpermanent disabilities be reviewed every three years, and instead provided that the Secretary should, after consultation with the state agency and based on a number of factors, determine the number of cases to be reviewed in each State. Pub. L. No. 97-455, § 3, 96 Stat. 2499, codified at 42 U.S.C. 421(i)(2). Finally, Congress required that the Secretary file semiannual reports to the appropriate congressional committees, including statistics on the actual operation and results of the continuing disability review process. § 6, 96 Stat. 2500-2501, codified at 42 U.S.C. 421(i)(3).

c. Despite these amendments, the CDR process continued to generate widespread controversy and litigation, primarily centered on the so-called "medical improvement" issue. That issue concerns the evidentiary standards that the Secretary must utilize in determining whether a person receiving disability

[5] The temporary authorization (as briefly extended by the Act of Oct. 11, 1983, Pub. L. No. 98-118, § 2, 97 Stat. 803) applied to any case in which the initial determination that the disability had ceased was made on or after (or was pending on administrative review on) the effective date of the Act (January 12, 1983), but before December 7, 1983. The Secretary was authorized to continue to pay benefits in such cases through June 1984 or until the ALJ rendered his decision, whichever occurred first.

benefits continues to be disabled. When the CDR process began in 1981, the Social Security Act did not impose any special standards for continuing disability reviews, and the claimant bore the burden of proving by medical evidence that he met the statutory standard of eligibility when his status was reviewed. See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976). The Secretary determined that the continuing eligibility inquiry should focus on whether the claimant's current condition satisfied applicable standards, rather than on whether his condition had changed. It was not the Secretary's position, however, that the prior finding of disability was irrelevant, because it might well shed light on the claimant's current condition. SSR 81-6 (1981); 20 C.F.R. 404.1579, 404.1586, 404.1594, 416.994 (1981).

Many claimants challenged the Secretary's approach, often in the form of massive class actions that substantially disrupted the orderly administration of the Social Security disability program. See, *e.g.*, *Lopez* v. *Heckler*, 725 F.2d 1489 (9th Cir. 1984), vacated and remanded, 469 U.S. 1082 (1984); *Kuehner* v. *Schweiker*, 717 F.2d 813 (3d Cir. 1983), vacated and remanded, 469 U.S. 977 (1984). They typically argued that if an individual was once found to be disabled he was entitled to a presumption that he continued to be disabled when his eligibility was subject to review, thereby effectively shifting to the Secretary the burden of producing evidence that the individual no longer was disabled. A number of courts of appeals agreed and held that the claimant should be afforded a presumption of continuing disability.[6]

[6] See, *e.g.*, *Rush* v. *Secretary of HHS*, 738 F.2d 909, 915-916 (8th Cir. 1984); *De Leon* v. *Secretary of HHS*, 734 F.2d 930, 936-937 (2d Cir. 1984); *Haynes* v. *Secretary of HHS*, 734 F.2d 284, 288 (6th Cir. 1984); *Dotson* v. *Schweiker*, 719 F.2d 80, 82 (4th Cir. 1983); *Patti* v. *Schweiker*, 669 F.2d 582, 586-587 (9th Cir. 1982). But see *Gist* v. *Secretary of HHS*, 736 F.2d 352, 355-357 (6th Cir. 1984); *Kuzmin* v. *Schweiker*, 714 F.2d 1233, 1237 (3d Cir. 1983).

Citing the "pressing need to end the acrimonious litigation that has engulfed this program" [7] (130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984) (remarks of Sen. Dole, Chairman of the Senate Finance Committee)), Congress passed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, which was signed into law on October 9, 1984. Section 2 of the Act, 98 Stat. 1794-1797, codified at 42 U.S.C. (Supp. III) 423(f), prescribed detailed standards for the termination of disability benefits that are somewhere in between those standards applied by the Secretary and those applied by some courts. See H.R. Conf. Rep. 98-1039, *supra*, at 26.[8] Congress also made specific provision "to re-

[7] On June 7, 1983, the Secretary had suspended disability reviews for certain types of cases involving mental impairments. And on April 13, 1984, the Secretary had announced a nationwide, temporary moratorium on CDRs. H.R. Conf. Rep. 98-1039, *supra*, at 30-31.

[8] Under the new standards, a recipient of disability benefits whose case is reviewed may be determined not to be entitled to benefits on the basis of a finding that his impairment is not disabling only if that finding is supported by: (1) substantial evidence that there has been medical improvement in the individual's impairment and that he is now able to engage in substantial gainful activity; (2) new medical evidence and a new assessment of the individual's residual functional capacity demonstrating that, although his condition has not improved medically, he has undergone vocational therapy or is the beneficiary of advances in medical or vocational therapy or tech-

solve the existing controversy over the medical improvement issue in the courts" (*id.* at 27) by prohibiting the certification of new classes on the issue and by mandating a remand of pending actions to the Secretary for reconsideration under the new standards. Pub. L. No. 98-460, § 2(d), 98 Stat. 1797-1798. See *Heckler* v. *Lopez*, 469 U.S. 1082 (1984); *Kuehner* v. *Schweiker*, 469 U.S. 977 (1984).

Congress made a number of other adjustments to the CDR program in the same Act. Among other actions,[9] Congress extended the interim benefits authorization under Title II until January 1, 1988. Pub. L. No. 98-460, § 7(a)(2), 98 Stat. 1803, codified at 42 U.S.C. (Supp. III) 423(g). It also required the

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nology and is now able to engage in substantial gainful activity; (3) substantial evidence based on new or improved diagnostic techniques demonstrating that the individual's impairment is not as disabling as it previously was considered to be and that he is now able to engage in substantial gainful activity; or (4) substantial evidence that the prior determination of disability was in error. Congress expressly provided, however, that there is no presumption of continuing disability and that the determination whether the person is currently disabled is to be made on a neutral basis after considering all evidence available in the file. 42 U.S.C. (Supp. III) 423(f), 1382c.

[9] Congress also required the Secretary to promulgate within 180 days final regulations establishing standards for determining the frequency of CDR reviews, Pub. L. No. 98-460 § 15, 98 Stat. 1808, 42 U.S.C. (Supp. III) 421 note, to publish revised mental impairment criteria and to delay resumption of periodic review of most mentally impaired individuals until the new standards were in place, § 5, 98 Stat. 1801, 42 U.S.C. (Supp. III) 421 note, and to publish uniform standards for disability determinations that would be binding at all levels of adjudication, § 10, 98 Stat. 1805, codified at 42 U.S.C. (Supp. III) 421(k)(1).

Secretary to establish demonstration projects in at least five states, pursuant to which the Secretary gives Title II and Title XVI recipients subject to a continuing disability review the opportunity for a personal appearance *prior to* the initial determination of ineligibility, rather than afterwards. § 6(d), 98 Stat. 1802, codified at 42 U.S.C. (Supp. III) 421 note. Thus, a recipient in the states covered by the demonstration project is enabled to argue his claim in advance of the initial determination, where the state agency has reached a preliminary conclusion adverse to the claimant. Congress has directed the Secretary to file a report concerning these projects. *Ibid.*

B. The Proceedings in This Case

1. Respondents are three individuals[10] who were recipients of disability benefits under Title II. They filed suit against Richard Schweiker, John Svahn, and William R. Sims in their official and individual capacities.[11] Richard Schweiker is the former Secretary of

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[10] Respondents withdrew their earlier motion for class certification following passage of the 1984 Disability Reform Act (see Pet. App. 4a, 15a). In addition, as stated at page II note *, *supra*, of the ten original plaintiffs only the three respondents pursued their claim through the court of appeals.

[11] Both Schweiker and Svahn have long since resigned. Respondents moved to substitute their successors, Margaret Heckler and Martha McSteen, pursuant to Fed. R. Civ. P. 25(d). The district court found, however, that Heckler and McSteen were not personally served and, thus, dismissed the claims against them in their individual capacities (Pet. App. 2a-3a n.1, 16a). By the time the case reached the court of appeals, only claims against officials in their individual capacities remained (*id.* at 4a), and consequently Heckler and McSteen, who have also since resigned, are no longer in the case.

Health and Human Services; John Svahn is the former Commissioner of Social Security; and William R. Sims is the present director of the Arizona Disability Determination Service (Arizona DDS).[12] Pet. App. 2a, 15a-16a.

Respondents were subject to "continuing disability review" (CDR), and had their benefits terminated pursuant to the CDR process. Their benefits, however, were ultimately reinstated through the administrative appeals process or on a subsequent application for new benefits. See Pet. App. 5a. Respondent Dora Adelerte began receiving disability benefits in May, 1973. An initial determination was made by the Arizona DDS in June, 1981 that her disability had ceased, and her benefits were terminated on the last day of July, 1981. An ALJ decision following a hearing restored her benefits and awarded retroactive benefits in August, 1982. Spencer Harris began receiving disability benefits in July, 1980. An initial determination was made that his disability had ceased in January, 1982 and his benefits were terminated in March. An ALJ decision reinstated his benefits in October, 1982 and retroactive benefits were paid in January, 1983. Respondent James Chilicky began receiving benefits in October, 1977. His benefits were terminated in November, 1981. Chilicky did not seek ALJ review of the termination decision which therefore became binding upon him. Instead he filed a new application for disability benefits in June, 1983 and was awarded benefits retroactive to July, 1982.[13]

[12] The Arizona DDS is a state agency authorized by statute to make initial disability determinations. 42 U.S.C. (& Supp. III) 421(a). See p. 6, *supra*.

[13] In September, 1983, despite his earlier failure to pursue his administrative remedies, Chilicky also sought reinstatement of his terminated benefits for the period from December, 1981 up to July, 1982, when benefits began under his new application. Chilicky relied upon the decision of the district court in *Lopez* v. *Heckler*, 572 F. Supp. 26 (C.D. Cal. 1983), aff'd in part and rev'd in part, 725 F.2d 1489 (9th Cir.), vacated and remanded, 469 U.S. 1082 (1984), for a waiver/tolling of the limitations period contained in the Act. This Court vacated *Lopez* and ordered the case remanded to the Secretary for reconsideration in light of the Disability Benefits Reform Act of 1984, which required that any pending class actions by terminated disability recipients "relating to medical improvement" be remanded to the Secretary for reconsideration of the claims of class members. This requirement applied even to unnamed class members who had not exhausted their administrative remedies or satisfied the 60-day filing requirement in 42 U.S.C. 405(g). Pub. L. No. 98-460, § 2(d)(3), 98 Stat. 1798.

The district court in *Lopez* had certified a class of, inter alia, all persons who reside in the states comprising the Ninth Circuit and who had their disability benefits terminated after August 30, 1981. See 725 F.2d at 1494. That class was subsequently modified by the court of appeals to eliminate claimants like Chilicky "whose benefits were terminated before August 30, 1982, unless they then either were in the process of appealing the termination or still had time remaining for so doing" (725 F.2d at 1500 (footnote omitted)). However, following this Court's remand, the district court entered an order on December 17, 1984, reinstating the contours of the class as originally certified. Thus, Chilicky's application for reinstatement of his terminated benefits may now constitute a timely application for such relief. The San Francisco Program Center, which covers the jurisdiction where Mr. Chilicky now lives, is currently processing and considering that application for retroactive payment of benefits for the period from December 1981 to June 1982.

In their complaint, respondents claimed that petitioners had violated their due process rights by, inter alia, accelerating the starting date of the CDR process; illegally nonacquiescing in the law of the Ninth

Circuit regarding "medical improvement"; failing to apply uniform written standards in implementing the CDR process; failing to render decisions consistent with allegedly dispositive evidence; and using an impermissible quota system under which state agencies were required to terminate a certain number of recipients. Pet. App. 2a-3a; see also pp. 21-22 n.15, *infra*. Respondents sought injunctive and declaratory relief, and money damages for "emotional distress and for loss of food, shelter and other necessities proximately caused by [petitioners'] denial of benefits without due process" (Pet. App. 3a n.2).

2. The district court dismissed the case in its entirety on qualified immunity grounds (Pet. App. 15a-18a). It concluded that the government's policy of accelerated review and alleged nonacquiescence violated no clearly established statutory or constitutional rights and, thus, that *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), barred respondents' damage claims with respect to these policies (Pet. App. 16a-18a). The district court did not discuss respondents' other claims, but apparently determined that they were barred by qualified immunity as well (see *id.* at 16a, 18a).

3. Respondents appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed in part, reversed in part, and remanded the case to the district court for further proceedings (Pet. App. 1a-14a). On appeal, the only issues raised by respondents pertained to their *Bivens*[14] claims for money damages against petitioners in their individual capacities (see Resp. C.A. Br. ii).

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[14] See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Petitioners contended that there was no subject matter jurisdiction to entertain respondents' claims, since the procedures set forth in 42 U.S.C. 405(g) are the exclusive means of redress for actions "arising under" the relevant provisions of the Social Security Act. See 42 U.S.C. (& Supp. III) 405(h). They also pointed out that the existence of the Act's elaborate procedures for resolving disability claims counsels strongly against judicial implication of a damages remedy, and that there could be no colorable claim of denial of due process when respondents were afforded the protections of Section 405(g). Petitioners further contended that the district court lacked personal jurisdiction over them and that, in any event, respondents' claims were barred by qualified immunity.

The court of appeals found that the district court had subject matter jurisdiction (Pet. App. 4a-6a). It reasoned that the action was not for restoration of disability benefits, but rather for damages stemming from alleged constitutional violations committed in terminating those benefits, so that it did not "arise under" the Social Security Act and was not barred by Section 405(h) (Pet. App. 6a). The court then ruled that the officials waived their personal jurisdiction defense by not raising it at the appropriate stage in the district court proceedings (*id.* at 7a-9a). Finally, the court of appeals affirmed the district court's dismissal on qualified immunity grounds of respondents' acceleration of review and nonacquiescence claims (*id.* at 11a-13a), but reversed the district court's dismissal on qualified immunity grounds of the balance of respondents' claims[15] and remanded

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[15] As described by the court of appeals (Pet. App. 13a-14a), the remaining allegations are:

for further proceedings (*id.* at 13a-14a). The court of appeals concluded that under the current record it could not determine that respondents could prove no state of facts establishing an actionable due process violation for the latter claims (*id.* at 14a).

The court of appeals denied petitioners' petition for rehearing with a suggestion of rehearing en banc, which was limited to the question of subject matter jurisdiction (Pet. App. 21a-22a).

SUMMARY OF ARGUMENT

The issue presented in this case is whether a disability claimant may bring a *Bivens* action to challenge alleged violations of his constitutional rights occurring in the course of proceedings leading to the termination of his disability benefits. In its decisions, this Court has recognized that three distinct but not mutually exclusive lines of reasoning may render such an implied cause of action inappropriate. First, Congress may expressly preclude such a remedy, by declaring that other remedies of its own creation are exclusive. Second, Congress may implicitly preclude a constitutional remedy by creating its own remedy, equally effective in the eyes of Congress, or by otherwise occupying the field with a comprehensive legislative scheme. Third, even apart from any express or implied decision by Congress, there may exist special factors counselling hesitation in the recognition of a constitutional remedy, because of the identifiable consequences such a remedy would have. All three of these lines of reasoning indicate that a *Bivens* remedy should not be recognized in this case.

1. Knowing use of unpublished criteria and rules and standards contrary to the Social Security Act.

2. Intentional disregard of dispositive favorable evidence.

3. Purposeful selection of biased physicians and staff to review claims.

4. Imposition of quotas.

5. Failure to review impartially adverse decisions.

6. Arbitrary reversal of favorable decisions.

7. Denial of benefits based on the type of disabling impairment.

8. Unreasonable delays in receiving hearings after termination of benefits.

1. Section 405(h) of Title 42, United States Code, should be taken as an express declaration by Congress that a *Bivens* remedy is precluded in this context. The second sentence of Section 405(h) states that the Secretary's findings of fact and decisions shall not be reviewed "except as herein provided," and Section 405(g) provides the exclusive avenue of review under the Act with specified forms of relief. Because a *Bivens* action seeking damages from an individual for alleged constitutional violations is not provided under Section 405(g), it is foreclosed by the explicit terms of Section 405(h).

Furthermore, the third sentence of Section 405(h) provides, inter alia, that no action "arising under" the Title II disability provisions shall be brought against an employee of the United States pursuant to 28 U.S.C. 1331, which is the essential jurisdictional predicate for a *Bivens* action. The present action, seeking relief for alleged constitutional wrongs occurring in the course of the administrative process leading to the temporary termination of respondents' benefits, plainly "arises under" the Title II provisions. This conclusion is not altered by either the constitutional nature of respondents' claims or by the fact that the relief they seek is not provided by the statute. Otherwise the bar to Section 1331 jurisdiction would exist only where it is redundant because a Section 405(g) remedy was already available. Be-

cause respondents' claims "arise under" the statute, and because Section 1331 is the essential jurisdictional predicate for a *Bivens* action, the third sentence of Section 405(h) expressly bars that avenue of relief.

2. By the creation and refinement of an elaborate, multi-step system of remedies for persons claiming entitlement to disability benefits, Congress has occupied the field and implicitly foreclosed the recognition of additional judicial remedies. Like the Civil Service Reform Act at issue in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Social Security Act and its statutory review procedures are the product of a carefully considered, step-by-step fine-tuning by Congress. In fact, Congress twice modified the Continuing Disability Review (CDR) process in which each of respondents was involved, first in 1983 and again in 1984, after consideration of the very concerns raised by respondents here.

The four-step review process provided by statute is designed to assure that no beneficiary loses benefits as a result of arbitrary decision-making. It has been liberally construed by this Court in various ways, and while the statute does not allow the full measure of damages that would be available under *Bivens*, it is in several respects, including speed and the absence of an immunity defense, more favorable to claimants than an implied constitutional remedy would be. As in *Bush* v. *Lucas*, Congress's statutory remedial scheme under the Social Security Act is both comprehensive and provides meaningful relief for the alleged constitutional wrongs related to the termination of benefits. Accordingly, it should be viewed as barring implication of an additional constitutional remedy.

3. Finally, the sheer size of Social Security Act programs, and particularly the Title II disability program at issue here, is a special factor counselling hesitation in the implication of such a judicial remedy. The millions of claims processed by the Social Security Administration mean that a remedy recognized here would bring major additional burdens to the courts and to the government officials who would be named as defendants and would participate in the defense of these cases. Given the already enormous commitment of resources to these programs and the serious governmental concern to control the future expansion of costs, the implication of such a further remedy could have seriously disruptive consequences.

ARGUMENT

A DISABILITY CLAIMANT CHALLENGING THE TERMINATION OF HIS BENEFITS MUST FOLLOW THE ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURES PRESCRIBED BY CONGRESS AND MAY NOT ALSO SEEK DAMAGES UNDER AN IMPLIED CONSTITUTIONAL CAUSE OF ACTION AGAINST OFFICIALS RESPONSIBLE FOR THE TERMINATION

A. Introduction

1. Although the Constitution establishes rights, it does not in general specify the remedy for violations of those rights. Congress and the courts, therefore, must prescribe remedies for constitutional violations. It is, however, axiomatic that unless the Constitution itself requires a particular form of relief, a federal court cannot provide a remedy unless it is authorized to do so explicitly or implicitly by statute. See, *e.g.*, *Sheldon* v. *Still*, 49 U.S. (8 How.) 441, 448-449 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.) ("the power to award the writ [of habeas corpus] by any

of the courts of the United States, must be given by written law").

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court allowed a plaintiff to seek damages from federal officials for an alleged violation of his Fourth Amendment rights. The Court specifically noted that it was not holding that the Constitution itself required the creation of the remedy (*id.* at 396), and Congress had not explicitly authorized such relief. But the Court noted that Congress had granted federal district courts general jurisdiction (28 U.S.C. 1331) to entertain claims arising under the Constitution, see 403 U.S. at 396, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); 403 U.S. at 405 (Harlan, J., concurring in the judgment), and that Congress itself had not prescribed a more specific remedy for Fourth Amendment violations, see 403 U.S. at 390, 397. Since Congress had created courts with jurisdiction over the claims, but had not established a specific remedy, the Court in *Bivens* concluded that federal courts were free to implement the remedies, including damages, that courts "[h]istorically" and "normally" have provided. See 403 U.S. at 395, 397; see also *id.* at 405, 408 n.8 (Harlan, J., concurring in the judgment); *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies • • •.").

In two subsequent cases, the Court followed the *Bivens* reasoning in recognizing an implied damage remedy under the Constitution. *Davis* v. *Passman*, 442 U.S. 228 (1979), recognized a plaintiff's claim

that she had been discharged from her position as a congressional employee because of her sex, in violation of the Fifth Amendment. 442 U.S. at 241-242, 245. In *Davis*, unlike *Bivens*, there was a relevant statutory remedial scheme—Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which provides a remedy for most acts of employment discrimination by the federal government. But the Court noted that Section 717 did not address the remedial question at issue in *Davis* itself because congressional employees are excluded from the coverage of Section 717 (see 42 U.S.C. 2000e-16(a), and, the Court ruled, Congress did not intend this exclusion to leave congressional employees remediless by precluding them from invoking other remedies for unconstitutional employment discrimination. See 442 U.S. at 247. The Court accordingly held that the plaintiff retained "the judicial remedies • • • [she] might otherwise possess" (*ibid.*).

In *Carlson* v. *Green*, 446 U.S. 14 (1980), the plaintiff was the survivor of a prisoner who allegedly died as a result of Eighth Amendment violations in the form of failure to give proper medical care. The plaintiff could have brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, for the wrongs asserted in the complaint. But the Court concluded, principally on the basis of the "crystal clear" legislative history of the 1974 FTCA amendment allowing FTCA actions based on intentional torts of law enforcement officers, that "Congress • • • contemplate[d] that victims of the kind of intentional wrongdoing alleged in [the] complaint shall have an action under [the] FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their

constitutional rights" (446 U.S. at 20). See also *id.* at 19 n.5 ("Congress • • • view[ed the FTCA remedy] as fully adequate only in combination with the *Bivens* remedy.").

In *Bush* v. *Lucas*, 462 U.S. 367 (1983), a similar inquiry into the apparent intent of Congress and the consequences of recognizing an implied constitutional remedy led the Court to reject the implied remedy. The plaintiff asked this Court to authorize a *Bivens* remedy for federal employees whose First Amendment rights are allegedly violated by their employers. The Court noted that Congress had "not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks or by providing him with an equally effective substitute" (422 U.S. at 378). It assumed that the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [plaintiff] for the harm he suffered" (462 U.S. at 372 (footnotes omitted)). The Court nonetheless held that, in light of the comprehensive procedural and substantive provisions of the civil service laws governing the employment relationship between the government and its employees, which the Court emphasized had "been constructed step by step, with careful attention to conflicting policy considerations" (*id.* at 382), it would be inappropriate to create a new *Bivens* remedy. *Id.* at 388-390; see also *id.* at 390-392 (Marshall, J., concurring).

2. In each of the cases leading up to *Bush*, the Court ensured before allowing a damages remedy that Congress had neither expressly foreclosed an implied constitutional remedy, nor legislated in a manner so as to occupy the field and therefore preclude an implied judicial remedy. In *Bush*, the Court

recognized that, where Congress *has* occupied the field, with a "comprehensive scheme" that provides "meaningful remedies" for alleged constitutional violations (462 U.S. at 386), it is inappropriate for courts to fashion such a remedy even without an express congressional statement to that effect. The Court has also noted that additional "special factors counselling hesitation" may preclude a *Bivens* remedy even "in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; see, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983).

Bivens and its progeny thus establish three distinct but not mutually exclusive lines of reasoning that may, in a given case, lead to the conclusion that an implied constitutional remedy would be inappropriate. First, Congress may have "expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress." *Bush* v. *Lucas*, 462 U.S. at 373; see *Carlson* v. *Green*, 446 U.S. at 19; *Davis* v. *Passman*, 442 U.S. at 247; *Bivens*, 403 U.S. at 397. Second, Congress may have impliedly precluded the creation of such a remedy either by creating "another remedy, equally effective in the view of Congress," *Bivens*, 403 U.S. at 397; see *Bush* v. *Lucas*, 462 U.S. at 388; *Carlson* v. *Green*, 446 U.S. at 19; *Davis* v. *Passman*, 442 U.S. at 248, or by occupying the field with a "comprehensive scheme" that provides remedies that are "meaningful" even though "not as effective as an individual damages remedy." *Bush* v. *Lucas*, 462 U.S. at 372, 386. And, third, there may be other "special factors" that "counsel[] hesitation" even "in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; see *Bush* v. *Lucas*, 462 U.S. at 377; *Chappell* v. *Wal-*

lace, 462 U.S. at 298; *Carlson* v. *Green*, 446 U.S. at 18; *Davis* v. *Passman*, 442 U.S. at 245.[16]

We submit that each of these lines of reasoning makes clear that creation of a *Bivens* remedy is inappropriate here. Congress has expressly precluded judicial creation of a constitutional damage remedy by providing that the statutory remedies are the exclusive mode of redress for a wrongful termination or denial of benefits. Additionally, Congress has completely occupied the field of Social Security disability benefits with a carefully drawn, comprehensive set of procedures that provides meaningful remedies for any constitutional violations that might occur in the processing of claims for benefits. Finally, there are additional special factors arising out of the sheer size of the Social Security system that counsel great hesitation in the judicial implication of a *Bivens* remedy.

B. Congress Has Expressly Declared That The Social Security Act Provides The Exclusive Mode Of Redress For A Wrongful Termination of Disability Benefits

This Court has not yet had occasion to consider in any detail what constitutes an "express" congressional declaration that a *Bivens* remedy should not be

[16] The Court in *Bush* (462 U.S. at 378-390) brought "the Government's comprehensive scheme" under the rubric of a "special factor[] counselling hesitation." It is clear, however, that congressional occupation of the field is not the only "special factor" that would "counsel[] hesitation" in the creation of a damages remedy. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. at 298, 304 (citing "[t]he special nature of military life" as such a factor). Indeed, the Court in *Bivens*, 403 U.S. at 396, stressed that the factors in question may come into play even "in the absence of affirmative action by Congress." After *Bush*, therefore, it may be best analytically to separate congressional occupation of a field from other special factors that would preclude an implied damages action even where Congress has not established an alternative remedy.

implied in any particular context. But the Court has stressed that no "magic words" are required to effect such a result. *Carlson* v. *Green*, 446 U.S. at 19 n.5. Congress need not exclude or even mention a constitutional damage action by name. The question is rather whether Congress has declared that the remedies it has provided constitute the exclusive mode of redress for the alleged wrong. That is precisely what Congress has done here, and deference to that legislative judgment is required by "the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies." *Id.* at 27 (Powell, J., concurring in the judgment). Section 405(h) of Title 42,[17] in two distinct ways, expressly deprives the courts of federal-question jurisdiction over claims "arising under" the Social Security Act and at the same time provides that the only remedies available for such claims are those offered pursuant to the administrative and judicial review process set forth in Section 405(g).[18]

[17] Section 405(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

[18] Section 405(h) applies by its own terms to all Title II claimants. Title XVI appears to incorporate the same preclusion of general federal-question jurisdiction by providing that the Secretary's final determinations "shall be subject to judicial review as provided in section 405(g) of this title to the

1. The second sentence of Section 405(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." This language precludes review except as provided in the Social Security Act, and Section 405(g) is the *only* mechanism in the Act for the review of findings of fact or decisions of the Secretary. Thus, judicial review of administrative decisions on claims for social security benefits is unavailable except as expressly authorized by Section 405(g). See *Califano* v. *Sanders*, 430 U.S. 99, 110 (1977) (Stewart, J., concurring in the judgment); S. Rep. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. 728, 76th Cong., 1st Sess. 43-44 (1939). Because the full remedy available from administrative or judicial review under Section 405(g) is the retroactive payment of disability benefits wrongfully terminated, it follows that Congress has expressly precluded any further remedy—such as damages—for an allegedly wrongful decision of the Secretary to terminate benefits.

Respondents may contend that this language constitutes only an exhaustion of administrative remedies requirement that does not apply to them since they are not in this instance seeking any remedy provided to them by the statute.[19] That reading, however, mistakes the plain terms of the second sentence, which categorically bar review, other than under Section 405(g), of all findings of fact or other decisions of the Secretary concerning benefit awards. Thus, Justice Stewart was quite correct, concurring in the

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same extent as the Secretary's final determinations under section 405 of this title." 42 U.S.C. 1383(c)(3). The preclusive effect of Section 1383(c)(3) is not at issue here, however, since all three respondents were receiving benefits only under Title II.

[19] In *Bowen* v. *Michigan Academy of Family Physicians*, No. 85-225 (June 9, 1986), slip op. 12 n.8, the Court held that the second sentence of Section 405(h) did not bar an action challenging a regulation governing payouts under Part B of the Medicare program. It reasoned that the action, challenging a substantive regulation setting benefit levels, did not concern a "decision" by "the Secretary after a hearing," so that Section 405(h) was inapplicable. We do not read *Michigan Academy* as purporting to define the application of the second sentence of Section 405(h) to actions, like the present one, arising out of specific denials of benefits.

In *Michigan Academy*, the Court cited its prior decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975), for the proposition that the purpose of the first two sentences of Section 405(h) was to ensure administrative exhaustion. In *Salfi*, the Court had confronted a challenge to the duration of relationship requirement of the Social Security Act, and ultimately concluded that the action could be maintained under Section 405(g). In relying on the third sentence of Section 405(h) to conclude that the action could not be brought under Section 1331, the Court reasoned that that sentence "would be superfluous" if it were "nothing more than a requirement of administrative exhaustion." "This is because the first two sentences of § 405(h) • • • assume that administrative exhaustion will be required. Specifically, they prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § 405(g)." 422 U.S. at 757 (citation omitted).

While the Court in *Salfi* made clear that the second sentence of Section 405(h) requires administrative exhaustion, it had no occasion to address the further implications of that sentence as a possible bar to actions not provided by the Social Security Act. Indeed, the Court found that the action before it was properly maintainable under Section 405(g), and thus was explicitly authorized by the second sentence of Section 405(h). *Salfi* therefore lends little support to a narrow construction of the second sentence of Section 405(h).

judgment in *Califano* v. *Sanders*, 430 U.S. at 110, in seeing "no reason in this case why the second sentence of § [4]05(h) should not be read to mean exactly what it says—that the decision before us is reviewable under § [4]05(g) or not at all." Because respondents seek to invoke remedies beyond those provided by the statute, to challenge alleged constitutional violations leading to the temporary termination of their benefits, their actions are precluded.[20]

2. The third sentence of Section 405(h) provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under Sections 1331 or 1346 of Title 28 to recover on any claims arising under this subchapter." While the second sentence of Section 405(h) requires all challenges to the findings or decision of the Secretary to be brought under Section 405(g), the third sentence precludes suit and deprives the court of jurisdiction under 28 U.S.C. 1331 "on any claim arising under" the social security disability program.[21]

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[20] Respondents clearly cannot avoid Section 405(h) by claiming that they are not challenging a "decision" of the Secretary, but only the procedures employed by the Secretary in reaching that decision. That argument was considered and rejected by the Court in *Mathews* v. *Eldridge*, 424 U.S. at 327, and *Heckler* v. *Ringer*, 466 U.S. 602, 614 (1984).

[21] By its terms, Section 405(h) only bars such actions when brought "against the United States, the Secretary, or any officer or employee thereof." One might argue, therefore, that it does not apply to suits against state officials, such as petitioner Sims. The court of appeals correctly recognized, however, that in administering the federally-funded disability program pursuant to detailed federal regulations, "Sims was acting under color of federal law" for purposes of Section 405(h). Pet. App. 6a n.3. "'To hold otherwise,'" the court noted (*ibid.* (quoting *Ellis* v. *Blum*, 643 F.2d 68, 76 (2d Cir. 1981)), "'arguably would invite applicants for Title II benefits to circumvent sections 405(g) and (h) by bringing suit under section 1331 against the state officials instead of the Secretary * * *.'" See also *United States* v. *Erika, Inc.*, 456 U.S. 201, 205-206 n.4 (1982).

"That the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Weinberger* v. *Salfi*, 422 U.S. at 757 (emphasis in original).

The court of appeals' holding that the district court properly entertained this action under 28 U.S.C. 1331 directly contravenes this jurisdictional bar. *Weinberger* v. *Salfi*, 422 U.S. at 757. The disability benefits statute "provides both the standing and the substantive basis for [respondents'] constitutional contentions." *Id.* at 760-761; see *Heckler* v. *Ringer*, 466 U.S. 602, 615 (1984). This *Bivens* suit is exclusively concerned with the Secretary's administration of that statute and with rights created under it. More specifically, respondents complain of improprieties that allegedly occurred in the course of the administrative process related to their benefit claims. It follows that general federal question jurisdiction will not support the suit, and that respondents' *Bivens* action must fail because Congress has explicitly restricted them to those remedies provided in the statute.[22]

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[22] In his dissenting opinion in *Weinberger* v. *Salfi*, Justice Brennan noted (422 U.S. at 795) that "a claim 'arising under' Title II is one which alleges that the Title grants someone

Respondents might argue that, because they are alleging constitutional violations in the procedures employed by the Secretary, their claims do not "arise under" the Social Security Act, but rather directly under the Constitution. That precise argument, however, has been squarely rejected by this Court. In *Weinberger* v. *Salfi*, 422 U.S. at 760-761, the Court held that the jurisdictional preclusion in Section 405(h) cannot be avoided simply because the plaintiff casts his allegations in constitutional terms. The Court adhered to that view in *Heckler* v. *Ringer*, 466 U.S. at 601 & n.7, 614-616, 622, holding that a constitutional challenge to the procedures utilized in the adjudication of claims "arises under" the Social Security Act for purposes of Section 405(h). See also *Mathews* v. *Eldridge*, 424 U.S. 319, 327, 330 (1976) (recognizing that federal-question jurisdiction is barred by 42 U.S.C. 405(h) even in a case where claimant is raising a constitutional challenge to the administrative procedures used to terminate welfare benefits that is "entirely collateral to his substantive claim of entitlement").

Alternatively, respondents might contend, as they did in their brief in opposition (at 19-20) and as did the court of appeals (Pet. App. 6a), that their claims do not "arise under" the Social Security Act because they are not seeking benefits provided by the Act. Rather they are seeking damages over and above any restoration of benefits. In *Weinberger* v. *Salfi*, *Mathews* v. *Eldridge*, and *Heckler* v. *Ringer*, the litigant's ultimate goal was the receipt of benefits. That

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certain rights." That is surely the case here. Respondents' constitutional claims depend on the allegation that Title II grants them a property interest in their benefits which cannot be deprived without due process of law.

is not true here where full benefits have already been restored. Because respondents are seeking a form of relief not provided by the statute, they argue that their claims do not "arise under" the statute.

Respondents are surely correct that the relief they seek is not provided by the Social Security Act, but they draw exactly the wrong conclusion from that premise. Sections 405(g) and (h) would serve little purpose if, while creating an exclusive statutory remedy for review of benefits decisions, they were also read to allow non-statutory remedies under Section 1331 on the ground that such remedies are not permitted under the Act. Plainly, challenges to the way in which specific benefits decisions are made do arise under the statute and, thus, may not be brought pursuant to the general federal question provision, 28 U.S.C. 1331, regardless of the relief sought.

In *Heckler* v. *Ringer*, 466 U.S. at 624, this Court explicitly rejected the suggestion that a "claim somehow changes and 'arises under' another statute" simply because the relief sought is not available under Section 405(g). The relief requested does not alter the nature of respondents' claims (that their benefits were terminated unconstitutionally), and this Court's precedents—*Heckler* v. *Ringer*; *Mathews* v. *Eldridge*—indicate that all such claims "arise under" the Social Security Act and, thus, cannot be brought under Section 1331. The scope of the preclusion in Section 405(h) is not limited by the scope of relief allowed under Section 405(g). Section 405(h) serves rather to limit claimants to Section 405(g) whatever the relief therein provided. Respondents claims cannot therefore be "characterized in a different way for purposes of § 1331 jurisdiction" (*Heckler* v. *Ringer*, 466 U.S. at 624) simply because they seek a form of relief that Congress has not pro-

vided in Section 405(g). Those claims "arise under" the Act within the meaning of Section 405(h), thereby precluding Section 1331 jurisdiction, despite the fact that the relief sought is not permitted by the Act.

Congress plainly did not contemplate bifurcated proceedings in which a claimant proceeds both under Section 405(g) to restore his benefits as well as under 28 U.S.C. 1331 for damages stemming from the termination. Both claims "arise under" the Social Security Act and thus the latter may not be brought under Section 1331 even though precluded under Section 405(g).[23] The Section 405(g) remedy is not, as respondents argue, an essential "predicate" for a subsequent *Bivens* action (Br. in Opp. 6); it is the exclusive remedy provided by Congress for the harm in question.

C. Congress Has Completely Occupied The Field Of Social Security Disability Benefits With A Carefully Drawn, Comprehensive Set Of Procedures That Provide Meaningful Remedies For Any Constitutional Violations That Might Occur In The Processing Of Claims For Benefits

In *Bush* v. *Lucas*, the Court assumed that the "civil service remedies were not as effective as an

[23] Congress could not have been any more explicit in making Section 405(g) the *exclusive* mode of redress for a wrongful termination of benefits. Section 405(h) does everything but preclude *Bivens* actions by name, which is something we could hardly expect since it predates *Bivens* by almost 32 years. Social Security Amendments of 1939, ch. 666, Tit. II, § 205(h), 53 Stat. 1371. Nor was Congress obliged in 1971, in order to make its intention clear, to amend its preclusion of Section 1331 jurisdiction by adding "(and we mean *Bivens* claims too)" since it had already eliminated the jurisdictional prop for such claims.

individual damages remedy and did not fully compensate [plaintiff] for the harm he suffered" (462 U.S. at 372 (footnotes omitted)). It concluded, however, that the proper focus for analysis was not on "what remedy the court should provide for a wrong that would otherwise go unredressed," but rather on "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue" (*id.* at 388). The Court held that, in light of the comprehensive procedural and substantive provisions of the civil service laws governing the employment relationship between the government and its employees, which the Court emphasized had been carefully constructed by Congress over many years, it would be inappropriate to recognize a new *Bivens* remedy. *Id.* at 388-390; see also *id.* at 390-392 (Marshall, J., concurring).

Like the civil service laws at issue in *Bush*, the Social Security Act's statutory review procedures were the result of a carefully considered, step-by-step fine-tuning by Congress. See, *e.g.*, *Heckler* v. *Day*, 467 U.S. 104, 111-118 (1984). They also provide meaningful remedies for any wrongful denial or termination of benefits. Indeed, as this Court has noted, "the Secretary and Congress have established an *unusually protective* four-step process for the review and adjudication of disputed [Title II] claims" (*id.* at 106 (emphasis added)). "The Act and regulations * * * create an orderly administrative mechism, with district court review of the final decision of the Secretary, to assist in the processing of the more than 7,600,000 claims filed annually with the administration." *Califano* v. *Sanders*, 430 U.S. 99, 102 (1977).

1. The very problems at issue in this case, associated with the CDR process, have been thoroughly considered and addressed by Congress. See pp. 9-17, *supra*. First in 1983 and again in 1984, Congress responded to the problems created by the high percentage of disability determinations subsequently reversed in the administrative process. To deal with the financial and emotional harm suffered by beneficiaries whose benefits were cut off while they pursued their administrative remedies, Congress made temporary provision (later extended to January 1, 1988) for claimants in Title II disability cessation cases to elect to continue to receive benefits pending receipt of the ALJ's decision. See 42 U.S.C. (& Supp. III) 423(g). See Act. of Jan. 12, 1983, Pub. L. No. 97-455, § 2, 96 Stat. 2498-2499, amended in 1984, Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 7(a), 98 Stat. 1803.[24] Congress also tried to improve the quality of the state agency decision-making process by providing for a face-to-face hearing on any motion for reconsideration (42 U.S.C. 405(b)(2)), and by establishing demonstration projects in five states pursuant to which Title II and Title XVI recipients subject to continuing disability review have the opportunity for a personal appearance prior to the initial determination of ineligibility rather than afterwards (42 U.S.C. (Supp. III) 421 note).

A close look at respondents' allegations (see Pet. App. 13a-14a; n.15, *supra*) shows that they embody the very concerns that have occupied Congress in the

[24] As noted above, the Secretary had already afforded similar protection to Title XVI SSI recipients in light of this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). See 20 C.F.R. 416.1336(b).

formulation of recent amendments to the Act. See H.R. Rep. 98-618, *supra*, at 6-22; S. Rep. 98-466, *supra*, at 7-26. Respondents' allegations that the Secretary has made "[k]nowing use of unpublished criteria and rules and standards contrary to the Social Security Act," and has denied benefits based on "quotas" or "the type of disabling impairments" are addressed in Congress's prescription of detailed standards for the termination of benefits (42 U.S.C. (& Supp. III) 423(f), 1382c) and in the requirement that the Secretary publish uniform standards for disability terminations binding at both the state and federal levels (42 U.S.C. (Supp. III) 421 (k)(1)) as well as standards for determining the frequency of the continuing disability reviews (42 U.S.C. (Supp. III) 421 note). Respondents' complaint that they experienced "[u]nreasonable delays in receiving hearings after termination of benefits," is precisely the question that this Court noted in *Heckler* v. *Day*, 467 U.S. at 112, has for the past decade "inspired almost annual congressional debate," and to which the Court declined to mandate its own solution "because of repeated congressional rejection of the imposition of mandatory deadlines on agency adjudication of disputed disability claims" (*id.* at 119).

Finally, respondents' allegations of "intentional disregard of dispositive favorable evidence," "purposeful selection of biased physicians and staff to review claims," "failure to review impartially adverse decisions," and "arbitrary reversal of favorable decisions" are all directed at the fairness and accuracy of the review process itself, the very process which, we note, restored respondents' benefits in full. This "orderly administrative mechanism" (*Califano*

v. *Sanders*, 430 U.S. at 102) is "unusually protective" of claimants' rights (*Heckler* v. *Day*, 467 U.S. at 106). Furthermore, Congress "closely monitor[s]" (H.R. Rep. 98-618, *supra*, at 22) the process through regular reports that the Secretary is required to furnish on various aspects of the continuing disability review program. 42 U.S.C. (Supp. III) 421 note.

In *Bush*, the Court "decline[d] 'to create a new substantive legal liability without legislative aid and as at the common law,' * * * because [the Court was] convinced that Congress [was] in a better position to decide whether or not the public interest would be served by creating it" (462 U.S. at 390 (citation omitted)). The exact same caution must apply here. Creation of a *Bivens* remedy "would be an unwarranted judicial intrusion into this pervasively regulated area" (*Heckler* v. *Day*, 467 U.S. at 119), wholly disrupting the balance struck by Congress between a concern for claimants and administrative and budgetary constraints. As in *Bush*, Congress has provided "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations" (*Bush*, 462 U.S. at 388), and that could only be impaired by recognition of supplementary, piece-meal remedies. See *id.* at 379-380, 388-389; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314 (1947). "If the balance is to be struck anew, the decision must come from Congress and not from this Court." *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984). Indeed, Congress made perfectly clear when it passed the Disability Benefits Reform Act of 1984 that it did not want *judicial* solutions to the problems raised by the Social Security Act and that it was acting both to replace and to forestall such solutions. See H.R. Conf.

Rep. 98-1039, *supra*, at 27; S. Rep. 98-466, *supra*, at 7; 130 Cong. Rec. S11454 (remarks of Sen. Dole).

2. The administrative and judicial review process under Section 405(g) provides a fully adequate remedy for an erroneous denial of benefits. See *Mathews* v. *Eldridge*, *supra*.[28] The review process is carefully designed "to insure that no beneficiary loses eligibility for benefits as a result of careless or arbitrary decision-making by the Federal government" (H.R. Rep. 98-618, *supra*, at 2). Mistakes at one level of review are corrected at the next level. *Id.* at 6 (the "multi-layered appeals system [is] an attempt to ensure as much objectivity as possible in an inherently subjective decision"). Section 405(g) embraces all claims that might "arise under" Title II, and litigants can thus raise due process and other constitutional challenges to administrative action

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[28] See also *Parratt* v. *Taylor*, 451 U.S. 527, 537-544 (1981). In *Parratt*, this Court declined to find that plaintiff had established a violation of the Due Process Clause of the Fourteenth Amendment where the claimed deprivation occurred as the result of an unauthorized failure of agents of the State to follow an established state procedure. The Court specifically noted (*id.* at 544) that the state remedies may not have provided plaintiff with all of the relief which he might have claimed in an action brought under 42 U.S.C. 1983. Nevertheless, the Court ruled that "[t]he remedies provided could have fully compensated the [plaintiff] for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process" (451 U.S. at 544). See also *id.* at 555 n.1 (citations omitted) (Marshall, J., concurring in part and dissenting in part) ("To be sure, the state remedies would not have afforded [plaintiff] all the relief that would have been available in a § 1983 action. I nonetheless agree with the majority that 'they are sufficient to satisfy the requirements of due process.'"); *Hudson* v. *Palmer*, 468 U.S. 517, 530-536 (1984).

within Section 405(g). *Weinberger* v. *Salfi*; *Mathews* v. *Eldridge*; *Heckler* v. *Ringer*. Moreover, 405(g) has been broadly interpreted to permit class actions for injunctive and declaratory relief. *Califano* v. *Yamasaki*, 442 U.S. 682 (1979); see also *Heckler* v. *Day*, 467 U.S. 104 (1984) (suit for state-wide injunctive relief cognizable under Section 405(g)). Furthermore, the Court has construed the "final decision" requirement in Section 405(g) to permit an early resort to the courts on certain claims that are collateral to the claim for benefits where risk of irreparable harm exists. *Weinberger* v. *Salfi*; *Mathews* v. *Eldridge*. Finally, the Court has held that the 60-day suit-filing period in Section 405(g) is subject to equitable tolling. *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986).

Section 405(g) admittedly does not allow damages for emotional distress stemming from an unconstitutional termination of benefits.[26] But Section 405(g) has significant advantages over a *Bivens* action, advantages similar to those of the civil service laws at issue in *Bush* v. *Lucas*. See 462 U.S. at 391 (Marshall, J., concurring). First, although the claimant has the burden of proving disability, the administrative appeals process is nonadversarial. *Mathews* v. *Eldridge*, 424 U.S. at 339; *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971). Moreover, where the claimant is already a recipient of benefits and is subject to continuing disability review under Section 421(i), there must in most cases be substantial evidence that the recipient's condition has improved medically to justify a termination of benefits. See

[26] It is not clear, however, that such damages would be available even in a *Bivens* action. See *Bush* v. *Lucas*, 462 U.S. at 372 n.9.

n.8, *supra*. Second, as with civil service remedies, the Social Security disability claimant is not required to overcome the immunity of agency officials.[27] And, third, the administrative action, without doubt, will prove consistently speedier and less costly than a lawsuit.[28]

Just as in *Bush* v. *Lucas*, the comprehensive remedial scheme established by Congress leaves neither need nor room for a *Bivens* action. In *Bush*, the plaintiff lost his job through allegedly unconstitutional action by an agency official. Here, respondents lost their benefits through allegedly unconstitutional action by agency officials. If reinstatement with back pay is both a "clearly constitutionally adequate" remedy (462 U.S. at 378 n.14) and sufficiently "meaningful" to forestall a *Bivens* remedy (462 U.S. at 368) in the former context, then reinstatement with back benefits is "clearly constitutionally adequate" and equally "meaningful" in the latter context as well.

[27] Officials involved in any decisionmaking process enjoy at least qualified immunity. Adjudicative officials are protected by absolute immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz* v. *Economou*, 438 U.S. 478, 508-517 (1978). Many of respondents claims attacking the fairness and integrity of the disability review process appear likely to encounter the latter defense.

[28] Although there are no deadlines for the various levels of the administrative process (*Heckler* v. *Day*, 467 U.S. 104 (1984)), the following average times apply to these steps in the administrative process: between appeal of initial adverse decision and reconsideration decision—approximately 80 days; between appeal of reconsideration and ALJ decision—approximately 172 days; between appeal of ALJ decision and Appeals Council decision—approximately 95 days. SSA 1987 Ann. Rep. to Congress 14; SSA Office of Hearings and Appeals Key Workload Indicators 1, 9 (Aug. 1987).

D. The Sheer Size Of The Social Security System Is A Special Factor That Counsels Against Judicial Creation of a Damages Remedy

An additional special factor that counsels strongly against the recognition of a *Bivens* remedy is the enormity of the Social Security Act programs. The SSA hearing system is " 'probably the largest adjudicative agency in the western world.' " *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted). See also *Califano* v. *Boles*, 443 U.S. 282, 283 (1979) ("As an exercise in governmental administration, the social security system is of unprecedented dimension."); *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971) ("The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend."). In the disability arena alone, SSA processes over two million claims each year. See *Heckler* v. *Day*, 467 U.S. at 106. In 1986, there were an estimated 77.5 million beneficiaries of the various social security programs. SSA 1986 Ann. Rep. to the Congress 2.

The size of these programs means that the potential and likely impact of the court of appeals' decision both on the federal courts and on the Social Security Administration would be intolerable. This is particularly so because a *Bivens* action, under the court of appeals' decision, would not depend on whether the Secretary's *final* decision is adverse to the claimant; it could be based solely on an initial adverse ruling. Thus, a *Bivens* claim would be possible even where—as here—the claimant otherwise has no basis for seeking judicial review of the Secretary's final decision under Section 405(g) because that decision is wholly favorable to the claimant. Respondents' "due process"

claim could be made by any claimant unhappy with an adverse benefit decision at any level of the administrative process.

The creation of a *Bivens* remedy to supplement the Section 405(g) remedy would substantially drain scarce agency resources. The costs of such suits would include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). A *Bivens* remedy would also hamper, through its in terrorem effect on agency officials (see *Bush* v. *Lucas*, 462 U.S. at 389), Congress's legitimate efforts to ensure that only those "verifiably unable to work" receive benefits (H.R. Rep. 98-618, *supra*, at 6).

Congress instituted the CDR program in 1980 "to deal with problems which had driven the cost of the program beyond the bounds that Congress had intended or found acceptable." S. Rep. 98-466, *supra*, at 6. Congress was seeking to keep this cost within manageable limits, and it continued to affirm the need to do so when it passed the Disability Benefits Reform Act of 1984. The Senate Finance Committee noted that the 1984 Act was necessary because "[t]he transition from a too loosely administered program with few post-entitlement reviews to a more tightly administered program with regular periodic reviews revealed weaknesses and ambiguities which need[ed] to be dealt with." But, the Committee stressed, "[i]t is the purpose of the Committee bill to deal with these problems while continuing the Congressional insistence that this program be tightly and carefully administered." S. Rep. 98-466, *supra*, at 6. If agency personnel charged with carrying out this congres-

sional mandate risk ruinous personal liability, any incentive to enforce the eligibility criteria and keep the system solvent will be sapped. *Bush* v. *Lucas*, 462 U.S. at 389.[20]

"[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed" (*Mathews* v. *Eldridge*, 424 U.S. at 348) in deciding whether a *Bivens* remedy is appropriate in any particular context. Congress's continuous attempts to balance the need for fair procedures with the need to keep the system solvent would be wholly disrupted, at enormous cost, by judicial creation of a *Bivens* action against agency officials. The Social Security system, as Congress itself has warned, simply will not bear such costs. "Lest there be any doubt," the Senate Finance Committee has stated, "the Committee does not intend an open-ended commitment of taxpayer funds should either those who administer the program at the State and Federal level or the courts disregard the intent of the Committee in such a way as to cause the costs of the program to grow out of control." S. Rep. 98-466, *supra*, at 7.

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[20] The relief sought in such suits would be wholly open-ended. Respondents in this case valued their damages at "no less than $10,000" against each petitioner (for a minimum of $30,000 per respondent). It is clear that the figure is simply an arbitrary one; respondents could have sought $100,000 with equal plausibility. If even one such claim succeeded the agency official could be financially destroyed. Alternatively, SSA itself might, by indemnifying the defendant, pick up the tab, thereby further imperilling the solvency of an already shaky system.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 202037 60142

RESPONDENT'S

BRIEF

No. 86-1781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD SCHWEIKER, ET AL.,
Petitioners,

v.

JAMES CHILICKY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

Over the course of their working lives, respondents earned and paid for an entitlement under the Social Security laws to receive disability benefits if illness or handicap should someday make it impossible for them to work. Because these benefits were the primary means of support for them and for their dependents,[1] the wrongful termination of those benefits con-

[1] That "all three respondents were receiving benefits only under Title II" (Government Brief ("GB") 32 n.18), and not under the expressly need-based Title XVI, obviously does not negate the allegations of their complaint, ¶¶ 232-35, that, like many other Title II recipients, they in fact were "primarily or exclusively" dependent on their Title II payments for survival. Complaint ¶ 232. *See* note 3, *infra*.

fronted them not simply with a need to dip into savings or to borrow funds elsewhere but with a deprivation of medicine and other essential items, as well as with a humiliating accusation that they were cheats and deadbeats. The Government concedes that, for such genuinely disabled individuals, "the denial of benefits will always cause the denial of what could have been bought with them — respondents' 'loss of food, shelter and other necessities . . . .'" (Petition for Certiorari ("Pet.") 14 (quoting the Complaint)). And there is no doubt that this loss in turn may cause injuries for which the costs of "repair" would far exceed the face amounts of the benefit checks wrongly withheld. As this Court observed in striking down a one-year waiting period for indigents seeking non-emergency medical care at county expense, diseases, "if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life." *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261 (1974).

Congress has provided an elaborate scheme for restoring disability benefits when they are denied or terminated incorrectly, however innocent the error. But no provision has been made to compensate the victims of a wrongful termination, however flagrantly unconstitutional the process leading to termination may have been, for the measurable harms — physical, emotional and material — they have suffered. Respondents were unfairly labeled fit to work and unjustly forced, for months or in some cases years, to do without medical or other essentials while they struggled to re-establish their eligibility for benefits and to recover, through elaborate statutory procedures, the missed benefit payments themselves.[2] Despite this complete

[2] The Government, while noting that these respondents had all of their disability benefits completely terminated until being reinstated by Administrative Law Judges ("ALJs") (or on a subsequent application, in the case of Mr. Chilicky) between 7 and 19 months later (GB 18), makes much (GB 12-13 & n.5, 16, 40) of the fact that Congress, from January 1983 to June 1984, and again from October 1984 to December 1987, provided that similarly situated Title II recipients could have elected to receive "interim benefits" up to the point of an ALJ ruling adverse to them. Such recipients, unlike those in this case, would experience a lack of funds needed for food, shelter and medication only after an adverse ALJ ruling and would therefore not suffer this irreparable harm from a wrongful termination at the state agency level. That observation, which obviously has no bearing on respondents' claims, simply means that the only *Bivens* actions that officials such as petitioners need fear if the Court of Appeals' decision is affirmed will be actions by Title II recipients who are unprotected by the 1983-84 or 1984-87 windows, or those Title II recipients who can show abuses at or above the ALJ level leading to an unconstitutional shut-off of benefits in their particular cases. Far from undermining respondents' case for a *Bivens* remedy, the Government's argument about interim benefits simply undermines its prophecy (GB 46-48) of an avalanche of burdensome litigation.

absence of a compensatory mechanism for the injury to anyone's body or spirit, the Government urges this Court to treat Congress' mechanism for belated restoration of the dollar benefits to which respondents were in any event entitled as fully substituting for a constitutionally based cause of action for damages under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

Respondents' complaint alleges that certain officials acting under color of federal law deliberately abused their power over respondents by, *inter alia*, groundlessly labeling respondents "cured" and capable of resuming gainful employment; unjustly and arbitrarily terminating the disability benefits which those individuals and their dependents desperately needed and to which they were entitled; and unlawfully putting those individuals through the lengthy, burdensome and expensive process of review, appeal, and ultimate benefit restoration that is available by statute.[3]

Of the three respondents in this case, all have been restored to disability status and two (Dora Alderete and Spencer Harris) have been paid retroactive benefits for the period during which they were terminated. The third respondent, James Chilicky, has not been paid his lost benefits, but he was contacted by the Social Security Administration ("SSA") — on the very day the Government served him with its brief in this Court — and informed that his retroactive benefits might be paid after further review.

[3] *See* Complaint ¶¶ 220-28. Since this case comes to the Court on a dismissal by the district court upon petitioners' motion prior to the filing of an answer to the complaint (Pet. App. 15a-18a), these allegations must be taken as true for purposes of this appeal.

All three respondents have been told by the Government that under no circumstances — however flagrantly and deliberately the petitioners might have violated their due process rights, and however clear it may be that those officials acted beyond the scope of any immunity — will a federal court be able to determine that their rights were indeed violated by the petitioners before benefits were restored and then award them damages for their injuries. Instead, the Government says, retroactive restoration of the benefits that should never have been taken from respondents in the first place is the most they may ever receive — simply because Congress has provided a system of review to assure such belated restoration of benefits in cases involving mistaken denial or termination. Although the Government can identify no point at which Congress even adverted to the question of how to redress the distinctive injuries inflicted on those who would never have suffered the material and spiritual harms of unjust benefit termination and would never have been forced to *seek* benefit restoration but for the deliberate violation of their constitutional rights, the Government asks this Court to treat Congress' system of mere benefit restoration as foreclosing the damages remedy that would otherwise be inferred by federal courts for such blatant violations of the Fifth Amendment's Due Process Clause.

It should be stressed that the victims of these alleged violations do not even seek exemption — as similar victims did in *Bowen* v. *City of New York*, 106 S.Ct. 2022 (1986) — from statutory requirements of exhaustion as a precondition of benefit restoration. Yet in granting just such an exemption there, this Court unanimously accepted a finding that "'[t]he ordeal of having to go through the administrative appeal process may [itself] trigger a severe medical setback. Many persons have been hospitalized due to the trauma of having disability benefits cut off. Interim benefits will not adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals.'" *Id.* at 2032 (citation omitted). *See also Mathews* v. *Eldridge*, 424 U.S. 319, 331 (1976); *Heckler* v. *Day*, 467 U.S. 104, 119 n.33 (1984); *id.* at 136-37 & n.16 (1984) (Marshall, J., dissenting).

This case does not pose the question whether any further exemption from established statutory procedures should be granted in order to ease the process of restoring wrongfully terminated benefits. At issue is a simpler, and in many ways more fundamental, question: should those disabled persons who have been unjustly put through this entire process of being cut off from the benefits they needed and were entitled to receive, and who have managed to survive their ordeal and win back what should never have been taken from them in the first instance, be deprived of any possibility of compensation in damages for the separate and distinct injury of being forced to run that gauntlet by deliberate abuses of government power — abuses that would predictably result in emotional and physical trauma and the interim deprivation of food, shelter, and other necessities? And should those officials who subjected society's most vulnerable citizens to this ordeal by deliberately violating their known constitutional rights escape all liability for having brought about such suffering — even if the rights they violated were so clearly established that their actions would not be shielded by any immunity doctrine pronounced by this Court?

These are issues that Congress simply *did not address* when it confronted the reality of what petitioners, and other SSA officials, did in administering the Continuing Disability Review ("CDR") process that was intended by Congress to clear from the rolls those and *only* those individuals who were no longer truly disabled. In extensive hearings, Congress learned that the SSA had "seized upon" the CDR process not simply to remove the able-bodied from the lists of the disabled, but to cut social spending at the expense of those who truly could not support themselves,[4] "us[ing] a meat-ax approach [to] slash[ ] checks to many persons actually disabled who deserve support under the program,"[5] callously "throwing the babies out with the bath water . . . ."[6]

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[4] *See* 130 Cong. Rec. H1960 (daily ed. Mar. 27, 1984) (remarks of Rep. Perkins); *see also id.* at H1961-62 (Rep. Pepper); *id.* at H1966 (Rep. Jenkins).

[5] *Id.* at H1970 (Rep. Anthony); *id.* at H1966 (Rep. Downey).

[6] 130 Cong. Rec. S6226 (daily ed. May 22, 1984) (Sen. Durenberger).

Senator Cohen, who conducted oversight hearings on the disability benefits crisis and co-authored the Senate bill that led to the Social Security Benefits Reform Act of 1984, Pub. L. No. 98-460, Stat. 1794 ("1984 Reform Act"), summed it up this way:

> [T]he message perceived by the State agencies, swamped with cases, was to deny, deny, deny, and, I might add, to process cases faster and faster and faster. In the name of efficiency, [government officials] scanned [their] computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go into a free fall toward economic chaos.

130 Cong. Rec. S6213 (daily ed. May 22, 1984). Indeed, the Senate sponsors of the 1984 Reform Act were moved to compile what they called "the injustice index — those persons who were wrongfully terminated only to be later reinstated after great personal hardship and expense. . . . SSA reports now that approximately 200,000 persons have been through such an unjust process, terminated only to be reinstated . . . ." 130 Cong. Rec. S11457 (daily ed. Sept. 19, 1984) (Sen. Levin).[7]

The Congressional Record is replete with what Senator Cohen termed the "horror stories" of SSA's disability purge: "people who were in body casts being terminated from disability, people in iron lungs being terminated from disability." *Id.* at S11460. As Representative Ratchford remarked, "when a woman with epilepsy and diabetes, paralyzed in bed with a stroke, is told that she will lose her only source of income because she should get a job, something is wrong." 130 Cong. Rec. H1954 (daily ed. Mar. 27, 1984).[8]

[7] Approximately two thirds of those recipients who appealed their terminations were ultimately reinstated to the disability rolls. 130 Cong. Rec. S11464 (Sen. Heinz).

[8] A study by the General Accounting Office revealed that, in one sample, 36% of "the former disability beneficiaries died of the very illnesses that the examiners had decided were not disabling." 130 Cong. Rec. S6235 (Sen. Bingaman).

The terminations of the respondents in this case follow the pattern with which Congress had become quite familiar by 1984. Respondent James Chilicky, for example, was told by SSA officials that he could no longer collect benefits, and should be able to return to work at once, because he was no longer disabled by his heart condition. He received this news while he was in the hospital recovering from open-heart surgery. While still in his hospital bed, he also received notice that he was in debt to SSA for a substantial overpayment of benefits received since his original termination notice, and that repayment of the full amount or a substantial part thereof was due within 30 days. Complaint ¶¶ 71-74.

It is not difficult to imagine the trauma caused by such a notification. As Senator Heinz, Chairman of the Special Committee on Aging, remarked: "The human dimension of this crisis — the unnecessary suffering, anxiety, and turmoil — has been graphically exposed by dozens of congressional hearings . . . ." 130 Cong. Rec. S11464. Nor was the toll measured in purely emotional terms. "People clearly unable to work found themselves stripped of the monthly income upon which they depended . . . . Many have ended up living on the streets." *Id.* (Sen. Heinz.) "Mortgages were foreclosed, cars and household goods were repossessed, and untold . . . suffering was caused as a result of termination decisions which were later overturned." *Id.* at S6228 (Sen. D'Amato).

For some victims, the impact was even more dramatic. "Some people committed suicide. Others tried to. We had people who died from heart attacks, many causally connected with the fact that they could no longer support themselves because they could not work. Yet they were terminated." *Id.* at S6213 (Sen. Cohen). When disability status was terminated, eligibility for Medicare benefits and treatment disappeared with it, leaving the disabled vulnerable to exacerbation of the very health problems which SSA insisted had been "cured." *Id.* at S6226 (Sen. Durenberger).

In this respect, too, the circumstances of the respondents in this case appear to be fairly typical.[9] All were primarily or

[9] *See* Complaint ¶¶ 232-35.

exclusively dependent on their disability benefits when they were terminated. All suffered immediate financial decline and could not maintain themselves or their families in a minimally adequate fashion. Although all the respondents were eventually restored to disability status, and two of them have been paid the retroactive benefits to which they were entitled, none of the respondents has received any compensation for the loss of food, shelter or other necessities directly caused by the unjust actions that forced them through a lengthy, expensive and onerous process of benefit restoration.[10] Nor has any of the respondents been offered any compensation for the less tangible but no less real emotional trauma inflicted by the actions that put them through this long ordeal. These are the damage claims that the Government has said "border on the frivolous." (Pet. 8).

Contrary to the Government's apparent suggestions (GB 13, 15), Congress by no means blamed supposedly litigious claimants for the federal lawsuits and appeals filed by terminated disability recipients. Senator Heinz stated a widely shared perception when he said that "[t]he root of this crisis is the Social Security Administration's improper, overzealous, and unfair implementation of the [1980 amendments]." 130 Cong. Rec. S6215.[11]

The 1984 Reform Act that Congress crafted to halt such unfair implementation enjoyed bipartisan support, passing the Senate by a vote of 99 to 0 and the House by a margin of 402 to 0. 130 Cong. Rec. H9834, H9838 (daily ed. Sept. 19, 1984). It imposed a medical improvement rule forbidding the SSA henceforth from terminating disability recipients without

[10] The Government's own account shows that the wrongful benefit cut-offs in respondents' cases lasted between 7 and 19 months. (GB 18). The Social Security appeals process "usually cost the beneficiary a substantial sum of money for attorneys fees — approximately 25 percent of the benefit amount — and took at least 9 months to 1 ½ years to complete during which time the person was not receiving disability benefits and was no longer eligible for Medicare coverage." 130 Cong. Rec. S11457 (Sen. Levin).

[11] *See also id.* at S6229 (Sen. Moynihan); 130 Cong. Rec. H1962 (Rep. Vento).

substantial evidence that their impairments have improved or that they are now, for other vocational or technological reasons, in fact capable of gainful employment. *See* H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 25 (1984). The Act also required SSA to notify recipients, upon initiating an eligibility review, of the consequences of such review and of the recipient's opportunity to submit medical evidence, and mandated that the SSA openly publish uniform standards for determining disability status. *Id.* at 32, 35-36. In order to clear up the backlog of litigation spawned by the SSA's mishandling of the CDR process, the 1984 Reform Act remanded to the SSA all benefit claims where the claimant had complied with exhaustion requirements and timely sought judicial review, and forbade the certification of new class actions seeking restoration of benefits on the ground that the SSA improperly refused to apply a medical improvement standard. *Id.* at 27.

Not a word of the legislative history, and nothing in the text of the Act itself, suggests that Congress thought that the statute somehow addressed the injuries that had already been inflicted upon the disabled victims who were the targets of the well-documented government abuses that the 1984 Reform Act was designed to end.

Of course, given this Court's decisions in *Davidson* v. *Cannon*, 106 S.Ct. 668 (1986), and *Daniels* v. *Williams*, 106 S.Ct. 662 (1986), no violation of procedural due process could be alleged by those whose disability benefits were erroneously terminated as the result of mere carelessness, negligence, or inadvertence. Thus the only claims of damages presented by this case are claims of harm caused by truly abusive government conduct — conduct involving deliberate disregard of favorable evidence, harassment of reviewing officers to induce them to make inaccurate and unfair terminations, and covert imposition of arbitrary or invidious quotas or other criteria calculated to save public funds but unrelated to the facts of respondents' cases.[12] Those who may have been unfortunately — but not

[12] *Cf. Bowen* v. *City of New York*, 106 S.Ct. 2022, 2032 (1986) ("These claimants stand on a different footing from one arguing merely that an agency

through deliberate illegality — put through the process of recovering disability benefits that they should never have lost are thus excluded from this case.

Similarly, given this Court's decisions as to the immunity of government officials who have not clearly violated a well-established constitutional right, *see, e.g., Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this case presents no claims arising from official failure to anticipate future constitutional developments or to follow still unsettled constitutional rules.

Finally, only nominal damages would be available to those victims of procedural irregularity who would have lost their benefit entitlements even if due process had been accorded from the outset. *See Carey* v. *Piphus*, 435 U.S. 247 (1978). This case thus presents no claims that could plausibly be advanced by individuals unwilling to exhaust the statutory procedures made available to determine whether their terminations were indeed improper. The only question posed, therefore, is whether those who — like the respondents here — have exhausted such procedures, and who were wronged by benefit deprivations caused by non-immune violations of clearly established due process rights, are to be deprived of any damages remedy against those who put them through an ordeal which they should, in fairness, have been spared.

SUMMARY OF ARGUMENT

What the Government would have this Court tell respondents is brutal in its simplicity: having gotten back the disability benefits that all agree respondents should never have lost in the first place, they may ask no court to adjudicate their claim

incorrectly applied its regulation. Rather, the District Court found a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations. Nor did this policy depend on the particular facts of the case before it; rather, the policy was illegal precisely because it ignored those facts. The District Court found that the policy was being adhered to by state agencies due to pressure from SSA . . . .").

that their loss of benefits was caused not by a constitutionally tolerable error but by government abuse in violation of Fifth Amendment due process — nor may they ask a court to compensate them for the physical and emotional injury they suffered by virtue of such abuse.

Respondents are disabled workers who were dependent upon their Social Security benefits when petitioners unconstitutionally terminated them. Respondents needed those benefits, at the time they were wrongfully withheld, to purchase food, shelter, medicine, and life's other necessities. The harm they suffered as a result bears no relation to the dollar amount of the benefits unjustly withheld from them. For the Government to offer belated restoration of back benefits in a lump sum and attempt to call it quits, after respondents have suffered deprivation for months on end, is not only to display gross insensitivity to the damage done to respondents' lives, but to trivialize the seriousness of petitioners' offense.

The Government's position would give respondents precisely the same thing whether or not they were victims of constitutional deprivation and would thus leave respondents with no post-deprivation remedy at all for the constitutional violations they allege (Part I) and with no access to a judicial forum for their constitutional challenge to the process that subjected them to injury. (Part III A, pp. 32-33).

That result would in turn pose serious constitutional questions that this Court has ordinarily avoided by assuming judicial access for federal constitutional claims and by inferring a constitutional cause of action for damages (Part II).

Although Congress might expressly preclude damage claims by providing an equally effective substitute, it certainly has not done so here; the sole function of the statutory provisions precluding judicial review outside the Social Security Act itself (42 U.S.C. §§ 405(g) & (h)) is to channel all benefit claims through the Act's own structure, not to close the courts to claims that seek damages under the Constitution, rather than benefits under the Act. (Part III).

Nor, finally, is this the sort of case in which "special factors" should make this Court hesitate before inferring a damages

remedy that Congress has not affirmatively authorized. (Part IV). Such special factors have been found to exist only where the usual inference of a damages remedy would intrude upon Congress' power over the purse or over military affairs, or would upset the delicate executive hierarchy of federal employer-employee relations, either military or civilian. No similar instrusion would be wrought by recognition of respondents' cause of action; petitioners' attempt to frighten the Court with images of an expensive and disruptive avalanche of litigation is as flawed as it is familiar.

To treat the "sheer size" of the Social Security system as a special reason to preclude constitutional review and to bar constitutional damages would make grave and unwarranted inroads on the rule of law and would create intolerable tension between the reality of the bureaucratic welfare state and the ideal of constitutional governance.

I. CLOSING THE DOOR TO ANY POSSIBLE DAMAGE RECOVERY WOULD LEAVE RESPONDENTS WITH NO MEANINGFUL REMEDY AT ALL FOR THE DELIBERATE VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Petitioners contend that, even if respondents can prove that they were unconstitutionally subjected to a termination process that sent them "into a free fall toward economic chaos"[13] followed, at most, by retroactive reinstatement of their benefits, they are entitled to no damages for their resulting hardships — hardships alleged to have been caused by deliberate violations of respondents' rights under the Fifth Amendment's Due Process Clause. According to the Government, damage claims for any harms caused by such wrongful deprivation "border on the frivolous." (Pet. 8). This Court has unanimously embraced the contrary view, that "[t]he ordeal of having to go through the administrative appeal process" and the "trauma of having

[13] 130 Cong. Rec. S6213 (Sen. Cohen).

disability benefits cut off" can constitute distinct and disastrous injuries: Not even "[i]nterim benefits" — which respondents in this case did not even receive — could "adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals." *Bowen* v. *City of New York*, 106 S.Ct. 2022, 2032 (1986) (quotation marks omitted). *See also Mathews* v. *Eldridge*, 424 U.S. 319, 331 (1976); *Heckler* v. *Day*, 467 U.S. 104, 119 n.33 (1984); *id.* at 136-37 & n.16 (1984) (Marshall, J., dissenting).

The legislative history of the 1984 Reform Act documents the tragic variety of "unjust and inhumane financial, emotional, and physical hardships which can never be amended"[14] that may flow from a wrongful disability termination. *See* pp. 6-8, *supra*. Those who have lost their homes, their belongings, their security and their remaining health — or their very lives — have suffered injuries that a belated benefit check cannot pretend to redress. Remarkably, the Government all but conceded as much in its Petition for Certiorari.[15]

If a financially sound corporation or a healthy and successful business executive were unlawfully denied a number of monetary payments owed by the government, a reasonable measure of the resulting injury might well be the total amount wrongly withheld, plus interest: for such a victim, substitute dollars may simply be borrowed at the prevailing rate until the withheld sums are paid. But when the victim is a disabled person dependent on those payments for food and medicine and unable to borrow the sums at issue, the injury inflicted by wrongfully withholding those payments at the time they are legally due and desperately needed is unlikely to bear any relation at all to the number of dollars cumulatively withheld. Withholding the few dollars a month that someone may need for chemotherapy or other medication could well cause, over the

[14] 130 Cong. Rec. H1963 (Rep. Regula). *See also id.* at H1964 (Rep. Roybal); *id.* at H1974-75 (Rep. Dyson).

[15] "[O]f course, the denial of benefits will always cause the denial of what could have been bought with them — respondents' 'loss of food, shelter and other necessities proximately caused by [petitioners'] denial of benefits.' " (Pet. 14, quoting the Complaint).

course of a year, injuries to health requiring thousands or even hundreds of thousands of dollars to cure — assuming that the patient remained alive and the condition remained treatable.

For victims who need their disability benefits to purchase food, shelter, or medical care *now*, it seems little better than a cruel joke to suggest that the damages caused by abusive termination of such benefits can be "compensated" by belatedly returning, in a handsome bouquet, the dollars accumulated by the United States Treasury during the period of wrongful withholding. The Government's astonishing analogy between giving "back pay" to an able-bodied NASA employee and restoring "back benefits" to a disabled person living on Title II (GB 45) displays an almost surreal insensitivity to the human condition. One might as well say that a rational measure of compensatory damages for the cruel and unusual punishment claim made by the deceased prisoner's mother in *Carlson* v. *Green*, 446 U.S. 14, 16 n.1 (1980), was the amount of money that prison authorities had saved by not buying her son the proper medication, respirator, and medical care he needed to treat the asthmatic condition that instead killed him.[16] Perhaps that sum would have paid for a suitable coffin — but it would have provided no meaningful compensation for her son's wrongful death.

Beyond the simple logic that the Government seems to have missed in this situation, being terminated unjustly and therefore being required to expend time, energy, and money seeking retroactive reinstatement entails still further categories of harm

[16] The Government's position that retroactive benefits are the exclusive measure of value in this situation is at least consistent with what Congress found to be the Social Security Administration's motive in its massive termination campaign: to "reduc[e] Government spending regardless of human costs," 130 Cong. Rec. S6235 (May 22, 1984) (Sen. Bingaman) — "to balance the budget on the backs of the disabled," 130 Cong. Rec. H1981 (Rep. Bevill). But surely a decision to sacrifice the interests of some of society's most vulnerable members in order to achieve fiscal responsibility has little to commend it in terms either of compassion or of the Constitution. *Cf. First English Evangelical Lutheran Church* v. *Cty. of Los Angeles*, 107 S.Ct. 2378, 2388 (1987) ("It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' ")

entirely independent of the sums withheld. Thus, the dignitary and emotional (as well as the material and physical) harms that respondents stand ready to prove (*see* Brief of Amici Curiae Organizations of the Disabled) include injuries that resulted because the SSA terminated respondents' benefits as part of an avowed effort to purge the disability rolls of what the SSA denounced as "cheats or deadbeats looking for an easy public handout." 130 Cong. Rec. H1966 (Rep. Jenkins).[17] Respondents' resulting financial and medical crises were thus given a cruel twist by "the indignity of being treated as cheat[s] and abuser[s] of the system to which they had contributed throughout their lives," *id.* at H1981 (Rep. Bevill). The value of due process and the injury that flows from its denial take on an added dimension "when a stigmatizing determination of wrongdoing or fault supplements removal of a presently enjoyed benefit." *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 801-02 (1980) (Blackmun, J., concurring in the judgment).[18]

Indeed, given Congress' findings (and respondents' allegations) of the adverse impact that termination had on disability recipients' health and well-being, petitioners' actions impaired *liberty* as well as property interests. For a constitutionally protected and separately compensable liberty interest may be abridged where government action adverse to an identified

[17] *See also* 130 Cong. Rec. H1980 (Rep. Mineta) (SSA adopted the attitude that "the disabled are guilty of waste and abuse unless they can prove otherwise").

[18] Although the Government suggests, citing *Bush* v. *Lucas*, 462 U.S. 367, 372 n.9 (1983), that "emotional distress" might not be compensable "even in a *Bivens* action" (GB 44 & n.26), such a holding seems plainly foreclosed by *Bivens* itself, since Bivens was allowed a constitutional claim even though the *totality* of harm he alleged consisted of "great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct . . . ." *Bivens*, 403 U.S. at 389-90. The "costs" whose recovery the Court left as an open question in *Bush* appear to have been the plaintiff's "attorney's fees," 462 U.S. at 372 n.9. Moreover, the possibility that emotional and dignitary harms might be deemed unrecoverable by someone in Bush's position — who had already had his reputation and financial fortunes fully restored by being reinstated with lost pay, interim raises, seniority and vacation benefits — says nothing about whether such harms should be compensable when they are the sole injuries a plaintiff alleges, or when they are part and parcel of related health and material injuries.

individual entails a serious likelihood of added stigma or of physical impairment, particularly where a high risk of death or of grave illness is created. *Id.* at 803. *See also Ingraham* v. *Wright*, 430 U.S. 651, 673-74 (1977) (recognizing liberty interest in being secure from physical injury and pain); *id.* at 692 (White, J., dissenting) (same); *Daniels* v. *Williams*, 106 S.Ct. 677, 680 (1986) (Stevens, J., concurring in the judgment) ("the interest in freedom from bodily harm surely qualifies as an interest in 'liberty'"). The Court should not be "soothed by the palliative that this harm is 'indirect.'"[19]

Finally, respondents' rights to equal treatment under the law were violated by what they allege to be petitioners' imposition of invidious quotas for terminations and petitioners' discrimination against beneficiaries with particular types of physical and mental disabilities. Complaint ¶¶ 226-27. The Government's theory would be fully applicable to quotas by race or gender; the point of the Government's view is that *why* respondents were terminated makes no difference to whether they should have a *Bivens* action.

If respondents could not seek compensation for the constitutional wrongs of the government agents who injured them, but were instead entitled only to a belated return of the accumulated monthly benefits that were always rightfully theirs, then it should follow, among other things, that government bodies would be relieved of paying compensation for having temporarily taken someone's property so long as the property was eventually given back. But that proposition was squarely re-

[19] *O'Bannon*, 447 U.S. at 803 (Blackmun, J., concurring in the judgment). Justice Blackmun concluded that, "where such drastic consequences attend governmental action, their foreseeability, at least generally, must suffice to require input by those who must endure them." *Id.* *A fortiori*, damages rationally corresponding to these injuries are appropriate if such "input" is wrongly denied or if the process ostensibly used in lieu of such input is rendered meaningless by application of arbitrary quotas and other invidious criteria extraneous to the individual's case. In addition to documenting the health injuries that petitioners' unconstitutional acts inflicted upon the disabled, the legislative history of the 1984 Reform Act makes clear that Congress was particularly distressed by the fact that "hundreds of thousands" of truly disabled people "have faced the cruelty and inhumanity of being disqualified, not by an examination, not by face-to-face contact, but by the computer printout saying, 'You are qualified to go back to work.'" 130 Cong. Rec. H9837 (Rep. Ratchford); *see also* 130 Cong. Rec. S6213 (Sen. Cohen).

jected in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S.Ct. 2378, 2388-89 (1987) — even where the "taking" was entirely lawful in the first instance.[20]

Yet all that the Government now stands ready belatedly to restore to claimants who can prove that they were unconstitutionally deprived of their benefits is the face amount of those withheld benefits — precisely what a claimant would receive upon a mere showing that his benefit termination or initial denial was innocent but erroneous or even upon a showing that new evidence or newly raised issues establish, in hindsight, that continuation rather than termination of benefits was in fact the appropriate course.[21] Thus, proving a deliberate constitutional wrong elicits precisely the same recovery as persuading an ALJ to reverse a good-faith administrative eligibility determination: the disabled victim on whom the Social Security

[20] To see the tension between the Government's position in this case and the holding in *First English*, one need only imagine what would happen if the County of Los Angeles, to save its taxpayers some money, had by regulation required James Chilicky and the other respondents to turn their disability benefit checks over to a Fund for the Disabled Poor for a number of months. Even if that temporary action (1) had served a proper public purpose before the county was ordered to stop by an Act of Congress, (2) had been applied even-handedly to similarly situated beneficiaries, and (3) had been promulgated in a manner that fully complied with the Due Process Clause, Chilicky and his fellows would nevertheless be able to invoke federal question jurisdiction to sue Los Angeles for the value *to them* of what had been taken for the taxpayers' benefit. *See United States* v. *Causby*, 328 U.S. 256, 261 (1946). *See also First English*, 107 S.Ct. at 2388. For, even if a Social Security entitlement is not "property" in the full Fifth Amendment sense, *see, e.g.*, *Bowen* v. *Gilliard*, 107 S.Ct. 3008, 3018-20 (1987); *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 106 S.Ct. 2390, 2397-98 (1986), it is certainly "property" in the sense that, so long as Congress keeps the statutory stream of benefits flowing, no other government actor may unconstitutionally fiddle with the faucet without being liable in damages for the harms that an unjust shut-off causes.

At a bare minimum, the value to the deprived entitlement-holders would certainly include interest on the sums temporarily withheld from their proper recipients. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162-64 (1980). But for recipients who are obviously in no position either to invest such sums or to borrow replacement funds, that value — "the owner's loss, not the taker's gain," *Causby*, 328 U.S. at 261 — would necessarily include the measurable harms attributable to the consequent losses of food, shelter, and other necessities toward whose purchase the withheld sums would have gone.

[21] As the Government explains (GB 7), either the claimant or the ALJ may develop new evidence or raise new issues not presented to the state agency.

system visited its unconstitutional abuse of governmental power, who was terminated because of an invidious or arbitrary quota, gets nothing more than the disability claimant for whom the Social Security system worked as it should. The government's award of retroactive benefits, therefore, hardly reflects an act of "compensation" for the wrong done by violating the beneficiaries' Fifth Amendment due process rights.[22] Nor is it even the product of a special congressional scheme of compensation for wrongs done. For retroactive benefits (without interest) represent a sum demonstrably *less* than that which the government or its agents would be obligated to pay those beneficiaries simply by virtue of the Takings Clause as construed by *First English*, and entirely apart from any showing of constitutional wrong.[23]

[22] To any suggestion that the victim of abuse and the claimant who experiences unintentional error suffer identically when benefits are terminated and therefore deserve the same compensation, there are at least four replies. *First*, even a dog knows the difference between being kicked and being stumbled over: the emotional trauma and dignitary harms flowing from callous, arbitrary and unjust treatment are distinct. *Second*, this Court has recognized the constitutional distinction between instances of official negligence and affirmative abuses of power, even if the tangible impact on the individual may be the same, *see Daniels* v. *Williams*, 106 S.Ct. 662, 664-65 (1986). *Third*, good-faith administrative errors are usually easier to correct than willful abuses of power — especially those promulgated or condoned at the top of the bureaucracy — and the inconvenience or injury they impose therefore tends to be of less intensity and of shorter duration. *Finally*, even if the harm to the claimant were the same, allowing the recovery of damages in cases of constitutional violations would serve to deter future deliberate abuses of power, while future accidents cannot as readily be discouraged.

[23] What made *First English* most controversial was the possibility that the particular "taking" allegedly caused by the regulation at issue entailed nothing beyond the "temporary burden on the citizen that is the inevitable by-product of democratic government." 107 S.Ct. at 2399 (Stevens, J., dissenting). But there was no dispute in that case that government "certainly may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation 'temporary.' " *Id.* at 2395 (Stevens, J., dissenting). Here the officials sued by respondents stand accused of unconstitutionally taking away, and then unjustly withholding for months on end, the respondents' use and enjoyment of the disability insurance benefits for which they had paid and had been receiving, and to which they were fully entitled by law. Respondents' allegations of unconstitutional conduct by those officials amply distinguish this case from any that might involve mere "normal delays" in the administrative process. *See* 107 S.Ct. at 2389 (opinion of the Court).

To hold that this overdue restoration of the very benefits improperly withheld is the limit of what the respondents may receive is, therefore, to hold that the violation of their Fifth Amendment due process rights, and all the harms that violation caused, must in fact go unreviewed and uncompensated, and that the violators must be spared any liability at all, despite the non-immune character of the constitutional wrongs that those violators committed. Yet even the *First English* dissent recognized that, quite apart from any just compensation requirement, those from whom property is taken ought to be able to invoke "the Due Process Clause," which "protects [them as property holders] from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking," *First English*, 107 S.Ct. at 2399 (Stevens, J., dissenting) — at least where such decisionmaking entails "the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson* v. *Cannon*, 106 S.Ct. 668, 670 (1986). *See also Daniels* v. *Williams*, 106 S.Ct. 662, 665 (1986); *Parratt* v. *Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring in the result). And, as even that dissenting opinion recognized, "[v]iolation of the procedural safeguards mandated by the Due Process Clause will give rise to actions for damages under 42 U.S.C. § 1983," 107 S.Ct. at 2399 (Stevens, J., dissenting).[24]

[24] That 42 U.S.C. § 1983 was not invoked by the plaintiff in *First English* did not prevent this Court from treating the Fifth Amendment's Takings Clause as requiring the state to compensate the entity whose property was taken. 107 S.Ct. at 2385-86 & n.9. Here, no claim is made that the Fifth Amendment automatically requires the government itself to guarantee compensation — only that the Amendment authorizes federal courts to infer a cause of action for compensatory damages against the government actors who were responsible for the procedural due process violation. That the Due Process Clause of the Fifth Amendment speaks in negative terms cannot preclude such relief here any more than it precluded the Court's conclusion in *First English*, where the Court was undeterred by the fact that, as the Government stressed in its Amicus Brief at 14, the Takings Clause says only that private property shall *not* be "taken for public use, without just compensation." Since no principle of sovereign immunity is implicated where, as here, relief is sought solely against government officers and not against the sovereign, the Court should be more willing, not less, to treat the Fifth Amendment as affirmatively supporting a

At least with respect to the Government's proposed holding of no compensation for the violations committed, such an outcome would be considerably more extreme than the result decreed even in the special circumstances of civil service employment in *Bush* v. *Lucas*, 462 U.S. 367 (1983). There, in a ruling respondents will argue is inapplicable in any event (*see* Part IV, *infra*), the statutory scheme that this Court treated as precluding damage awards to public employees discharged in violation of the First Amendment compensated those employees for that violation at least to the extent of determining that a violation had indeed occurred and then awarding them reinstatement with back pay, missed salary advances, accrued vacation time, and restoration of full seniority.[25] Those are forms of redress to which plaintiff Bush would not have been entitled if he had been demoted or discharged to "promote the efficiency of the [civil] service," 462 U.S. at 386, perhaps as part of a staff reduction-in-force or as a cost-saving measure. Because Bush's "entitlement" to continued employment was decisively qualified by these governmental interests in efficiency under the statute on which his entitlement was based, the remedies Congress accorded him — restoration of both his reputation and his financial fortunes — were available *only* because Congress had created a "comprehensive scheme" specifically designed to "provide[ ] meaningful remedies for employees who have been unfairly disciplined for making critical comments about their agencies." *Id.* at 386.[26]

This is not to say that it would necessarily violate the Due Process or Takings Clauses of the Fifth Amendment for this

damages remedy. *Cf. Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in judgment) ("For people in Bivens' shoes, it is damages or nothing."); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979) ("For Davis, as for Bivens, 'it is damages or nothing' ").

[25] Two Justices, in fact, concluded that the civil service procedures "afford[ed] a remedy that is substantially as effective as a damages action." 462 U.S. at 390-91 (Marshall, J., joined by Blackmun, J., concurring).

[26] In this sense, Bush's reinstatement was a remedy for the alleged abuse, not just a restoration of something to which he was entitled regardless of the government's interests and regardless of any showing of abuse. It simply cannot be said, therefore, that for Bush, as for these respondents, it was "damages or nothing," *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

Court, or Congress, to preclude all compensation for injuries to property and liberty caused to those disabled persons whose entitlements are directly taken, and whose liberty is indirectly constricted, in violation of procedural due process. But it would at least raise a significant question under the Fifth Amendment were any branch of the federal government to take that step, and there is every reason for the Court to avoid that constitutional quandary by inferring a damages remedy that Congress has not clearly precluded. In this case, as in *Bush* v. *Lucas*, the Court "need not," and therefore should not, "reach the question whether the Constitution itself *requires* a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right," 462 U.S. at 378 n.14 (emphasis added) — a question that would be posed where, as in this case but not in *Bush*, the effect of the Government's position would be to leave respondents with *no violation-related remedy at all*. Whether or not the Constitution requires such a remedy, it plainly permits and harmonizes with one. Here, after all, as in *Davis* v. *Passman*, 442 U.S. 228, 246-47 (1979), there is no "express textual command to the contrary," *Bush*, 462 U.S. at 378 n.14, and this Court has in the past been properly reluctant to test the limits of federal power to leave constitutional wrongs wholly unremedied. To that proposition we now turn.

II. THIS COURT HAS BEEN PROPERLY RELUCTANT TO LEAVE VICTIMS INJURED BY CONSTITUTIONAL VIOLATIONS WITHOUT ANY MEANS OF REDRESS.

The Government argues as though it would be unremarkable to leave constitutional injuries unredressed in this case by limiting relief to a restoration of the benefits that would be due even if there had been no constitutional violation. In fact, such a decision should be recognized as quite remarkable indeed, and as demanding extraordinarily clear and compelling justification.

This Court's inference of a damages remedy for a violation of federal constitutional rights in *Bivens* drew on constitutional wellsprings as deep as any known to our jurisprudence: the Court relied on Chief Justice Marshall's classic pronouncement that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *See Bivens*, 403 U.S. at 397. As Justice Harlan put it in his concurring opinion in *Bivens*, "it is important, in a civilized society, that the judicial branch . . . stand ready to afford a remedy" for constitutional violations. *Id.* at 411 (concurring in the judgment). To infer such a damages remedy here, the Court need not embrace the expansive common law maxim of "ubi jus, ibi remedium," *see generally* 3 W. Blackstone, Commentaries *23, *109. *Cf. Bush* v. *Lucas*, 462 U.S. at 373. For respondents' complaint seeks compensation not for mundane legal "injuries that attend living together in society," *Daniels* v. *Williams*, 106 S.Ct. at 666, nor even for the sort of "temporary burden on the citizen that is the inevitable by-product of democratic government," *First English*, 107 S.Ct. at 2399 (Stevens, J., dissenting), but for "real *abuses* by . . . officials in the exercise of governmental powers," *Parratt* v. *Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring in the result) (emphasis in original). A damages remedy is necessary here both to compensate for completed constitutional injury and to deter similar abuses of power, *see, e.g., Carlson* v. *Green*, 446 U.S. 14, 21 (1980). As this Court recognized earlier this month, "the salutary effects that the threat of liability can have, . . . as well as the undeniable tension between official immunities and the ideal of the rule of law, [have made] this Court . . . cautious in [freeing] government officials . . . of the obligation to answer for their acts in court." *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip op. at 4; *accord, Westfall* v. *Erwin*, No. 86-714 (Jan. 13, 1988), slip op. at 3.

Whether the responsible officials are held personally accountable or government itself provides the compensation,

the Court has taken for granted the availability of compensation from *some* suitable source. Thus, for example, the series of decisions from *Parratt* v. *Taylor, supra,* and *Hudson* v. *Palmer,* 468 U.S. 517 (1984), through *Daniels* v. *Williams, supra,* and *Davidson* v. *Cannon,* 106 S.Ct. 668 (1986), proceeded on the *premise* that, at the very least, government must provide a post-deprivation mechanism for meaningfully compensating any victim of a due process violation for the measurable harms inflicted by that violation. *Cf. Memphis Community School District* v. *Stachura,* 106 S.Ct. 2537, 2544-45 (1986). *Parratt* and *Hudson* held that, in circumstances where *pre*-deprivation process could not reasonably be assured, such *post*-deprivation compensation constitutes the *only* "process" that the Fifth and Fourteenth Amendments demand.[27] To be sure, *Daniels* and *Davidson* held that, where mere *negligence* by a government official unintentionally causes injury to life, liberty, or property, *no* post-deprivation means of compensation is required by due process — but only because, in such circumstances, *there is no due process violation to compensate*. Indeed, this Court could hardly have made clearer its supposition that, if there *is* such a violation, then a means of compensating that violation *must* be provided:

> In *Daniels,* we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. *In other words,* where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required.

Davidson, 106 S.Ct. at 670 (emphasis added).

The Government seizes on language in *Parratt* and *Hudson* to the effect that the compensatory mechanism mandated by due process need not provide a "plaintiff with all of the relief which he might have claimed in an action brought under 42

[27] Pre-deprivation process is constitutionally required where the injury is neither random nor unauthorized but the result of a deliberate government practice. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433-36 (1982).

U.S.C. § 1983." (GB 45 n.28). The Government's desired inference is that *no* damages remedy need be provided. But even a cursory examination of the passages cited by the Government makes plain that the Court implied nothing of the sort; it said only that a post-deprivation compensation mechanism need not, as a matter of due process, provide for "an action against . . . [the State's] individual employees" as opposed to "an action against the State" itself,[28] or contain "provisions for punitive damages," or guarantee "a trial by jury." *Parratt*, 451 U.S. at 543-44; *see also Hudson*, 468 U.S. at 534-36. In *Hudson*, the Court added that a post-deprivation damages remedy is not rendered constitutionally inadequate by the fact that money can never compensate fully for certain "sentimental" or "intangible" losses, since "this is as much so under § 1983 as it would be under any other remedy." 468 U.S. at 535. *See also Bush* v. *Lucas*, 462 U.S. at 372, 388 (a constitutionally adequate post-deprivation remedy need not necessarily include every possible element of damage, or every procedural nicety, that a § 1983 action would provide). This Court has never suggested, however, that a victim of an unconstitutional deprivation of life, liberty, or property might be deemed to derive constitutionally adequate compensation from mere restoration of the very items that would have to be returned even if no violation had taken place.

On the contrary, in the pages of the *Hudson* opinion which the Government specifically cites, the Court had this to say: "[I]ntentional deprivations do not violate [the Due Process] Clause *provided, of course, that adequate state post-deprivation remedies are available*. Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause . . . if a meaningful post-deprivation remedy *for the loss* is available." 468 U.S. at 533 (emphasis added). *See also id.* at 537 (O'Connor, J.,

[28] *See also Daniels*, 106 S.Ct. at 680-81 (Stevens, J., concurring in the judgment) (noting that sovereign immunity defenses do not automatically render post-deprivation remedies constitutionally infirm).

concurring).[29] Can anyone suppose that a prisoner whose food or medication vouchers (rather than a mere hobby kit) had been wantonly destroyed for months on end by prison authorities in a case like *Parratt* or *Hudson* would be deemed meaningfully "compensated" by a tardy award of the money that the food or medication would have cost, rather than the amount by which their deprivation had injured the prisoner?

It is true, of course, that the Court has recognized contexts so exceptional as to warrant a wholly different approach to due process — an approach in which no damages at all need be made available to redress injuries traceable to an unconstitutional deprivation. Thus, in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and *United States* v. *Stanley*, 107 S.Ct. 3054 (1987), the Court declined to infer constitutional damages actions for injuries that "'arise out of or are in the course of activity incident to service'" because of "'the unique disciplinary structure of the Military Establishment and Congress' activity in the field'" — a field in which the Constitution grants Congress a unique degree of plenary control. *Stanley*, 107 S.Ct. at 3063 (citations omitted); *accord, Chappell*, 462 U.S. at 301, 304. Although some Members of the Court have opined that a post-deprivation damages remedy must be made available as a matter of due process — even in the military context — if the violation is sufficiently egregious, *see Stanley*, 107 S.Ct. at 3065 (O'Connor, J., concurring in part and dissenting in part); *id.* at 3076-77 (Brennan, J., joined by Marshall

[29] It is doubtful that the Government means to suggest that respondents need no remedy under the Due Process Clause because they can bring *state*-based damages actions against the petitioners, as could the plaintiffs in *Hudson* and *Parratt*. After all, the whole point of the Government's opposition to a damages remedy against Social Security officials is that they — and the Social Security system in which they toil — should be spared the burdens of litigation outside §§ 405(g) and (h) challenging their administration of the disability system, not that such litigation ought to proceed solely on the basis of whatever state law (e.g., the law against intentional infliction of emotional distress) might happen to apply. In this sense, the Government's argument against inferring a *Bivens* remedy in this case bears no resemblance to the Government's argument against such a remedy in *Bivens* itself, where the thrust of the position rejected by this Court was that, absent an Act of Congress to the contrary, state rather than federal law ought to provide the sole basis, and the exclusive measure, of any award of damages against federal agents who violate the Fourth Amendment. *See Bivens*, 403 U.S. at 390-91.

and Stevens, JJ., dissenting), the Court has been unanimous in its appraisal of military affairs as a truly unique area wherein the Court has accorded Congress greater deference than in any other. *Chappell*, 462 U.S. at 300-04.

At the very least, this Court's cases establish that the decision to leave a constitutional deprivation uncompensated should be reached only in truly extraordinary situations, and only with the greatest hesitation. It should neither be lightly attributed to Congress nor casually arrived at by this Court where Congress has been silent. That Congress has neither expressly nor implicitly precluded a damages remedy in this case is shown in Part III, *infra*; and that this is not the special sort of case in which the Court should await the affirmative creation of a damages remedy by Congress is shown in Part IV, *infra*.

III. CONGRESS HAS NOT ATTEMPTED TO FORECLOSE A DAMAGES ACTION FOR VIOLATIONS OF THE RESPONDENTS' DUE PROCESS RIGHTS.

It is well established that actions for damages may be brought directly under the Due Process Clause of the Fifth Amendment. *Davis* v. *Passman*, 442 U.S. 228, 244 (1979). It is equally well established that judicial inference of such actions may be inappropriate "where there is an 'explicit congressional declaration that persons injured by a federal officer's violation of the [Constitution] may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.'" *United States* v. *Stanley*, 107 S.Ct. at 3060-61 (quoting *Bivens*, 403 U.S. at 397).[30] Congress has not made such an explicit declaration with respect to the harms alleged by respondents nor has it provided an alternative remedy, let alone one it deems to be equally effective.

[30] The possibility of defeating such a cause of action by showing special factors counselling hesitation is discussed in Part IV, *infra*.

A. Congress has not expressly barred a *Bivens* action.

No provision of the Social Security Act, including 42 U.S.C. §§ 405(g) & (h), contains an "'*explicit* congressional declaration that persons' in [respondents'] position injured by unconstitutional [acts] 'may not recover money damages from' those responsible for the injury." *Davis* v. *Passman*, 442 U.S. at 246-47 (quoting *Bivens*, 403 U.S. at 397) (emphasis in original). The Government does not attempt to identify any language constituting such an explicit ban on actions for damages, arguing instead that "Congress has expressly precluded judicial creation of a constitutional damage remedy by providing that the statutory remedies [in § 405(g)] are the exclusive mode of redress for a wrongful termination or denial of benefits." (GB 30).

The Social Security Act created a system for distributing disability benefits and determining eligibility for them. Congress anticipated that disability claimants might disagree with the SSA's decisions to deny or to terminate their benefits; Congress therefore provided a way for claimants to obtain judicial review "where a claim has been denied by the Secretary," 42 U.S.C. § 405(g). This section empowers the district court to enter "a judgment affirming, modifying, or reversing" the SSA's benefit determination, but makes no mention of any other sort of grievance an individual might have with the SSA. The next provision, § 405(h), states that "[n]o findings of fact or decision of the Secretary shall be reviewed" except as provided in § 405(g) and that actions "to recover on any claim arising under" the Social Security Act may not be brought under 28 U.S.C. §§ 1331 or 1346. Taken together, these provisions unambiguously declare that individuals whose benefit claims are denied or terminated by the SSA may seek reversal of such actions only through judicial review pursuant to § 405(g). Thus, anticipating only disputes over the correctness of decisions to deny or to terminate benefits, Congress designed machinery to provide for orderly review of such decisions and made plain that rights that have their origin in the

Social Security Act — rather than in the Constitution, other statutes, or elsewhere — are to be enforced only on direct appeals from the Secretary's decisions.

The Government (GB 31-32) reads these sections differently, in an argument that goes like this: (1) The second sentence of § 405(h) prohibits jurisdiction under 28 U.S.C. § 1331 to review "findings and decisions of the Secretary after a hearing"; (2) this means that "judicial review of administrative decisions on claims for Social Security benefits" is available only under § 405(g); (3) the only remedy available under § 405(g) is the retroactive payment of disability benefits; (4) therefore, under these provisions, "it follows that Congress has expressly precluded any further remedy — such as damages — for an allegedly wrongful decision of the Secretary to terminate benefits."

The problems with the Government's supposed syllogism begin with its first premise: it is true, but irrelevant. Respondents in this litigation do not seek review of the SSA's "findings and decisions" on their claims for benefits; as the Government is aware, respondents were ultimately *successful* in their administrative appeals to the Secretary's federal agents, and their disability status was re-established at the ALJ level or on a subsequent application for benefits. Respondents never disputed the "findings" or "decisions" reached in their cases "after [administrative] hearing[s]"; their *Bivens* claims arise from the initial abuses by state officials, acting under color of federal law, in unconstitutionally terminating their benefits in the first place, thereby forcing them to seek Secretarial hearings with all the delay and expense which that ordeal involves. *See* Parts I and II, *supra*. Respondents are aggrieved by what they allege to be the unconstitutional policies and practices implemented by petitioners at the initial, state agency level of the CDR process: arbitrary disregard of overwhelming evidence, invidious discrimination against particular disabilities, and imposition of arbitrary quotas for terminations. They are also (and independently) aggrieved by the practice of deliberately stretching out the process of reviewing and eventually reversing adverse initial determinations.

Broadly applied policies and practices such as these do not constitute "decision[s] of the Secretary after a hearing," as this Court unanimously ruled in *Bowen* v. *Michigan Academy of Family Physicians*, 106 S.Ct. 2133, 2140 n.8 (1986) (rejecting a precisely parallel government argument that the second sentence of § 405(h) bars federal question jurisdiction over challenges to broadly applied SSA rules). Thus, by its very terms, that sentence of § 405(h) has no application whatever to respondents' claims.[31]

There is also a serious error in the Government's logic when it contends that, because § 405(g) provides only a mechanism for eventually restoring previously terminated benefits, "it follows" that Congress meant to preclude any compensation for unconstitutionally forcing respondents to suffer while they ran the procedural gauntlet to get their benefits reinstated. (GB 32). Nothing of the sort "follows." The Government simply *assumes* that Congress was thinking about how to redress that latter, constitutional violation when it designed its scheme for reviewing disability terminations.[32] The Government identifies

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[31] The Government suggests that this Court's reading of § 405(h) in *Michigan Academy* has no bearing on "actions, like the present one, arising out of specific denials of benefits." (GB 33 n.19). This does not distinguish *Michigan Academy*. The plaintiff physicians in that case — *unlike* the respondents here, but like the plaintiffs in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Heckler* v. *Ringer*, 466 U.S. 602 (1984) — challenged instructions and regulations of the Secretary that barred them from receiving the benefits which they believed they were due. If such a constitutional challenge can proceed under federal question jurisdiction notwithstanding the fact that the point was to obtain more benefits — albeit not necessarily in a particular case — then *a fortiori*, challenges to the validity of instructions, regulations and collateral administrative practices are not barred from review under § 1331 where, as in the present case, the aim of challenge is not to receive more benefits (at *any* time or in *any* case) but to receive compensation for injuries caused by wrongful termination.

[32] It is at least as likely that, because Congress focused only on how to restore erroneously withheld benefits without regard to whether the error reflected unavoidable accident or carelessness or unconstitutional abuse, Congress meant to say *nothing at all* about whether or how to remedy the distinct harms caused by instances of such abuse. Indeed, if Congress had assumed that the subject of redressing constitutional violations should be left entirely to the federal judiciary unguided by any statutory directive, why would Congress not have acted precisely as it did? It is said that someone once told Wittgenstein that the reason the sun was long assumed to circle the earth was that, to a person

litērally nothing in the Social Security Act or its legislative history that even suggests Congress was addressing remedies for governmental abuses of power. On the contrary, the structure of § 405, with its requirements of administrative exhaustion and its preclusion of federal judicial end-runs, as well as its legislative history,[33] suggest that Congress' only "purpose was to make clear that whatever specific procedures it provided for judicial review of final action by the Secretary were exclusive, and could not be circumvented by resort to the general jurisdiction of the federal courts." *Michigan Academy*, 106 S.Ct. at 2140. *See also Ellis* v. *Blum*, 643 F.2d 68, 74 (2d Cir. 1981) (Friendly, J.).[34]

This understanding of § 405(h) — unlike that offered by the Government — comports fully with this Court's cases applying that provision as a bar to federal lawsuits "seek[ing] to recover Social Security benefits," *Weinberger* v. *Salfi*, 422 U.S. 749, 756-57 (1975), whether by challenging the substantive eligibility rule that prevents an award of benefits, *see id.* at 760-62; or by attempting to reopen a previously adjudicated denial of benefits, *Califano* v. *Sanders*, 430 U.S. 99 (1977); or by seeking an injunction compelling the Secretary to change the substantive rules so as to make the claimant eligible for benefits, *Heckler* v. *Ringer*, 466 U.S. 602, 614, 620 (1984).

This Court's precedents can be made to support the Government's novel interpretation of § 405(h) only if one lifts language from the opinions with great care. For example, the Government (GB 34) quotes Justice Stewart's concurring opinion in *Califano* v. *Sanders* for the proposition that the supposedly categorical language of the second sentence of § 405(h) means

standing on our planet, the sun "seemed" to be the moving object. "But how," Wittgenstein is reported to have asked, "would the matter have to appear for it to 'seem' the other way around?"

[33] *See* S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 43-44 (1939).

[34] The fact that § 405(h) "predates *Bivens* by almost 32 years" (GB 38 n.23), proves nothing. The 1984 Reform Act on which the Government relies so heavily (GB 15-17, 24, 40, 42, 47, 48) postdated *Bivens* by 13 years, and gave Congress ample opportunity to "preclude *Bivens* actions by name." (GB 38 n.23).

just what it says — "that the decision before us is reviewable under § 405(g) or not at all." 430 U.S. at 110. That statement might help the Government's argument if the decision before the Court in *Sanders* were whether to allow a federal damages remedy for unconstitutional abuses of power by the Secretary and his federal and state subordinates. But, in the same paragraph, Justice Stewart made it plain that the only question was whether to allow a lawsuit to "reopen the prior decision denying benefits to Sanders." *Id.* Indeed, in a footnote Justice Stewart explained, as respondents have here, that the *sole* purpose of § 405(h) is to "bar[] attempts to circumvent [the § 405(g)] procedures, whether by seeking review under [§ 405(g)] without having fulfilled the exhaustion requirement, or by seeking review under some other jurisdictional grant that does not prescribe the administrative steps that must first be taken." *Id.* at 111 n.*.[35]

Petitioners also contend that respondents' *Bivens* action is barred by the third sentence of § 405(h), which "precludes suit and deprives the court of jurisdiction under 28 U.S.C. § 1331 'on any claim arising under' the Social Security disability program." (GB 34, quoting § 405(h)). The cornerstone of this argument is an indefensibly expansive reading of the phrase "arising under," which the Government would construe to include actions seeking damages for due process violations committed by officials of the SSA in orchestrating and administering the notorious disability purge which has been documented and deplored by Congress. *See* pp. 5-9, *supra*.

The last time the Government presented such an argument to this Court, the Government lost. In *Bowen* v. *Michigan Academy*, *supra*, plaintiffs did not challenge the correctness of individual Medicare benefit decisions; rather, they charged that certain broadly applied administrative regulations violated the Fifth Amendment. Citing, as it does here, *Weinberger* v. *Salfi* and *Heckler* v. *Ringer*, *supra*, the Government argued

[35] It should be added that the opinion of the Court in *Sanders* distinguished that claimant's routine complaint about a denial of benefits from "one of those rare instances where the Secretary's denial of a petition to reopen [a benefit application] is challenged on constitutional grounds." 430 U.S. at 109.

that § 405(h) "expressly precludes all administrative or judicial review not otherwise provided in that statute," 106 S.Ct. at 2137, and that it "prevents any resort to the grant of general federal-question jurisdiction contained in 28 U.S.C. § 1331." 106 S.Ct. at 2140. The Court unanimously rejected that absolute view because it would have required the Court to "indulge the Government's assumption that Congress . . . intended no review at all of substantial . . . constitutional challenges to the Secretary's administration of . . . the Medicare program." *Id.* at 2141. *See also Ellis* v. *Blum*, 643 F.2d 68, 76 (2d Cir. 1981) (Friendly, J.) ("Clearly, § 405(h) does not bar plaintiff's [*Bivens*] claim . . . for damages to redress her emotional distress, since [this is] not . . . a claim 'arising under' Title II.").

The Government's reading of § 405(h)'s "arising under" language likewise requires this Court to assume, quite remarkably, that Congress meant to bar all judicial consideration of respondents' constitutional claims. The Government evidently feels the need to reassure the Court that "litigants can . . . raise due process and other constitutional challenges to administrative action within Section 405(g)." (GB 43-44). But that reassurance is starkly inconsistent with the Government's own application of § 405(g) to respondents' claims. Since respondents had their benefits restored to them during the administrative process, they have — in the Government's own words — "no basis for seeking judicial review of the Secretary's final decision under Section 405(g) because that decision is wholly favorable to the claimant[s]." (GB 46).[36] The only controversy that remains — whether the petitioners violated respondents' due process rights and are liable for damages — is one that, under the Government's reading of § 405(g), *no court would have jurisdiction to review*. For, if the Government is correct that the "full remedy available from . . . judicial review under § 405(g) is the retroactive payment of disability benefits wrongfully terminated" (GB 32), then a district court

[36] This serves to distinguish this case from *Weinberger* v. *Salfi*, *Mathews* v. *Eldridge*, and *Heckler* v. *Ringer*, where the plaintiffs sought a judicial forum in order to force the Secretary to award them benefits or at least (in *Ringer*) to declare them eligible for such a benefit award at a later time.

would be barred by § 405(g) from granting respondents *any* relief whatsoever for their injuries. There would, indeed, be no Article III "case" or "controversy": without the power to provide any declaratory or injunctive relief or damages, the district court would be reduced to issuing an advisory opinion that petitioners had violated respondents' due process rights before their benefits were restored.[37]

Thus the Government has perched itself upon the horns of a dilemma: if a *Bivens* damages claim were indeed cognizable by a district court under § 405(g), then the disarray, disruption, and financial drain that would supposedly attend allowing such a remedy under § 1331 (GB 25, 42, 46-48) would become irrelevant. Conversely, if — as seems likely — judicial review of respondents' constitutional claims is not available under § 405(g), then reading § 405(h) to preclude federal question jurisdiction over those claims denies respondents not only a damages remedy but *any judicial forum in which to challenge the petitioners' allegedly unconstitutional conduct*. That is a radical result this Court has always been loath to reach, given the "'serious constitutional question' that would arise" from any such construction, *Bowen* v. *Michigan Academy*, 106 S.Ct. at 2141 & n.12 (quoting *Salfi*, 422 U.S. at 762, and citing such cases as *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring)).[38]

[37] No such drastic preclusion of all judicial review of constitutional claims follows in cases such as *Salfi* and *Ringer*, where the constitutional challenge was to the validity of a substantive rule making certain claimants ineligible for benefits, or in a case such as *Mathews* v. *Eldridge*, where the constitutional challenge was to the validity of a practice pursuant to which the government had determined the claimants to be ineligible. Channelling all such challenges through § 405(g) did not entail rerouting them to a jurisdictional dead end, since a federal court reviewing the Secretary's denial of a claim to benefit entitlement in cases like *Salfi* must rule on the validity of the constitutional challenge to the rule or practice which the Secretary defended as a basis for deeming the claimants ineligible. But where, as here, the constitutional dispute (over alleged procedural due process violations leading to benefit termination followed by ultimate reinstatement) has no bearing on any claimant's eligibility for benefits, a form of judicial review limited by statute to eligibility determinations, with remedies limited to awarding benefits or declaring classes of beneficiaries eligible, by definition cannot reach the constitutional issue that the claimants wish to tender.

[38] *See also Califano* v. *Sanders*, 430 U.S. at 109; *Weinberger* v. *Salfi*, 422 U.S. at 762; *Johnson* v. *Robison*, 415 U.S. 361, 366-67 (1974); *Abbott*

Perhaps hoping to distract the Court's attention from this truly radical implication of its position, the Government declines to discuss the recent *Michigan Academy* opinion itself, preferring to rely (GB 33 n.19) on *Salfi* and *Ringer*, which the Government reads as requiring the holding that respondents' *Bivens* claims "arise under" the Social Security Act. (GB 35-37). What the Government overlooks is that § 405(h)'s bar was applicable in those cases because the Social Security claimants were all attempting end-runs around the administrative process *in their pursuit of benefits* to which they said they were entitled and the SSA said they were not. All such claims of entitlement to Social Security benefits obviously "arise under" the Social Security Act because entitlement to those benefits is *created* by that Act. The Government once again misapprehends the nature of respondents' complaint. This is not a lawsuit about entitlement to disability benefits — respondents have been reinstated to benefit status, and they have no quarrel with the SSA's view as to their entitlement to such benefits. (*See* GB 46). This is a lawsuit about the harms unjustly and unnecessarily inflicted upon respondents when their benefits were originally terminated only to be reinstated later, and about the petitioners' liability for their unconstitutional abuses of power which forced respondents to undergo the ordeal of termination and appeal.

The Government also misapprehends the nature of the right that respondents allege was violated. (*See* GB 35-36 n.22). It was not their statutory right to particular disability benefits under the law, but their constitutional right to due process in the administration of the disability insurance program. Although respondents' benefit "entitlement arose from [the Social Security] statute," the "right to due process 'is conferred, not

Laboratories v. *Gardner*, 387 U.S. 136, 140 (1967); *Yakus* v. *United States*, 321 U.S. 414, 433-44 (1944); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362, 1378-79 (1953). Even if the Government were correct in attributing to Congress a desire to foreclose *Bivens* remedies without saying so inasmuch as *Bivens* postdated § 405(h) (*see* note 34, *supra*), no similar excuse could explain Congress' failure to state expressly its intention to immunize the constitutionality of administrative action under the Social Security Act from *all* judicial review.

by legislative grace, but by constitutional guarantee' . . . ." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in the result in part)). *See also Vitek* v. *Jones*, 445 U.S. 480, 490-91 (1980).[39]

This distinction is critical. In *every* case which the Government invokes for its sweeping construction of § 405(h)'s language, this Court recognized — *and stressed* — that the plaintiffs' claims "arose under" the Social Security Act and were therefore barred outside § 405(g) precisely because, "regardless of any arguably procedural components," *Ringer*, 466 U.S. at 620, "they all seek relief that will allow them to receive benefits yet bypass that administrative process altogether." *Id.* at 624. *See also id.* at 611, 614-16, 621, 623 & n.13; *Salfi*, 422 U.S. at 755-57, 760-62; *Califano* v. *Sanders*, 430 U.S. at 109. Respondents here seek no such thing. The Government nevertheless insists that, regardless of whether respondents seek an award of (or a declaration of eligibility for) benefits or, instead, seek damages for an independent constitutional wrong, their challenge "arises under" the Social Security Act and cannot be brought pursuant to § 1331:

> In *Heckler* v. *Ringer*, 466 U.S. at 624, this Court explicitly rejected the suggestion that a "claim somehow changes and 'arises under' another statute" simply because the relief sought is not available under Section 405(g) . . . . Respondents' claims cannot therefore be "characterized in a different way for purposes of § 1331 jurisdiction" . . . simply because they seek a form of relief that Congress has not provided in Section 405(g).

[39] The Government is mistaken in saying that *Salfi* "squarely rejected" this "precise argument." (GB 36). What the Court said in that case, on the very page which the Government cites, is that § 405(h) cannot be avoided when a plaintiff seeks "a judgment directing the Secretary to pay Social Security benefits. To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment." 422 U.S. at 761. On the following page, the Court stated that "[t]he language of § 405(h) . . . extends to any 'action' seeking 'to recover on any [Social Security] claim,'" *id.* at 762 (bracket insert in original).

(GB 37-38) (quoting *Ringer*, 466 U.S. at 624). A more candid use of the Court's language in *Ringer* would have revealed that the "claim" which unmistakably "arose under" the Act and thus could not be disguised by artful pleading was what the Court held to be "in essence *a claim for benefits*," *Ringer*, 466 U.S. at 624 (emphasis added).[40]

Indeed, the Government labors mightily to obscure the fact that the cases on which it relies all dealt with attempted end-runs by plaintiffs seeking benefits. Yet that carefully elided fact is the key to understanding what Congress was trying to accomplish with §§ 405(g) & (h) and why affording respondents a *Bivens* action will in no way interfere with congressional aims. In *Heckler* v. *Ringer*, this Court concluded its analysis of the balance struck by Congress in § 405(g) & (h) with these words:

> Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year.

466 U.S. at 627. This Court has consistently held that claimants seeking relief in the form of the benefits to which they believe themselves entitled (either in anticipatory declarations, as in *Ringer*, or in retrospective awards, as in *Salfi*) are barred by § 405(h) from invoking § 1331 jurisdiction because allowing such jurisdiction would encourage claimants to bypass Congress' exhaustion requirements and would invite the lower federal courts to disrupt operation of the administrative regime.

There can be no such threat of "premature judicial intervention" in this case because respondents have already, of necessity, completed the administrative process and re-established

[40] The Court found no difference between a claim that a particular surgical procedure is covered by Medicare and therefore should be declared eligible and a claim that a particular individual is eligible and therefore should be awarded a disputed benefit payment.

their entitlement to disability benefits: successful pursuit of the administrative remedy of benefit restoration is an essential predicate to maintaining a plausible *Bivens* action.[41] At this juncture, with respect to these claimants, there is no administrative procedure left to exhaust and no disability insurance claims process which the courts must be wary of disrupting. At this stage, a *Bivens* action under § 1331 and a claim for disability payments under § 405(g) are not parallel routes to redress for a constitutional violation, but complementary responses to the terminations suffered by respondents: without restoration of their lost benefits, respondents would be shortchanged on their entitlements and unable to show that the violation of due process had led to an erroneous result. But without a *Bivens* action, respondents cannot recover compensation for the separate injuries they suffered because due process was violated, requiring them to seek benefit restoration.

B. Congress has not precluded a *Bivens* action by providing an exclusive substitute remedy.

A *Bivens* action for damages "may be defeated in a particular case" if "defendants show that Congress has provided an alternative remedy which is explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980) (emphasis in original). *See also Bivens*, 403 U.S. at 397; *Davis* v. *Passman*, 442 U.S. at 245-47. If Congress means to substitute a statutory remedy for a *Bivens* action, it may indicate its intent by "clear legislative history" or perhaps even by the nature of the alternative statutory remedy it provides. *Bush*, 462 U.S. at 378. As the Government points out, the Court "has not yet had occasion" to define precisely what constitutes an "explicit" congressional directive that the courts are not to infer a *Bivens* remedy. (GB 30-31). But this Court's

[41] Unless a recipient establishes that an initial termination was substantively erroneous, she can never obtain more than nominal damages for her claim that the initial deprivation was without due process. *See Carey* v. *Piphus*, 435 U.S. 247 (1978).

precedents do provide considerable guidance on the sort of congressional action that does *not* suffice to strip the federal courts of their traditional power to remedy constitutional wrongs by awarding damages.

The case on which the Government relies most heavily, *Bush* v. *Lucas*, is highly instructive in this regard. Plaintiff Bush sued his employer, the National Aeronautics and Space Administration, for damages when he was demoted for making critical public remarks about NASA. The opinion of the Court reviewed closely the long history of congressional attention to government infringement of employees' First Amendment rights. *See* 462 U.S. at 382-85. In seeking proper forms of redress, Congress had repeatedly "weighed the competing policy considerations" and balanced "the conflicting interests" involved. *Id.* at 384-85. The result was "a comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights." *Id.* at 390 (Marshall, J., concurring).[42] The system redressed violations by reinstatement and the awarding of back pay, seniority, scheduled salary increases and accumulated vacation time; the Court concluded that "Congress intended that these remedies would put the employee 'in the same position he would have been in'" had the constitutional violation not taken place. *Id.* at 388 (opinion of the Court) (quoting the Senate Report on the statute).

Nevertheless, this Court unanimously declared in *Bush* that "Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks or by providing him with an equally effective substitute." *Id.* at 378. All of this legislative history and this specific and elaborate remedial scheme, while "relevant to the question whether a federal employee's attempt to recover damages from his superior for violation of his First Amendment rights in-

[42] *See also id.* at 388, 386 (opinion of the Court) (describing "an elaborate remedial system that has been constructed step by step" to provide "meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies").

volves any 'special factors counselling hesitation,'" did not constitute a clear "congressional directive" foreclosing the plaintiff's *Bivens* claim. *Id.* Thus, while the *Bush* opinion may not furnish an exact recipe, as it were, for express congressional displacement of a *Bivens* remedy, it provides a clear understanding of what does *not* constitute a cake.

Turning to the case at hand, there is even less here than there was in *Bush* to suggest that Congress intended to provide a substitute remedy for constitutional wrongs. In stark contrast to *Bush*, there is no evidence that Congress ever even addressed the issue of after-the-fact remedies for constitutional violations by those charged with administering the Social Security Disability Insurance program. The Government can point to nothing in the legislative history or the statutory framework that suggests any legislative intent to devise a remedial scheme for such due process violations, much less to make it supplant — rather than supplement — forms of redress implied by the Constitution itself.

C. Nor has Congress precluded a *Bivens* remedy by "occupying the field" of disability benefits.

In addition to making the argument — unsupportable in these circumstances but at least grounded in the language of *Bivens* and *Bush* — that Congress unequivocally acted to foreclose a constitutional damages claim, the Government presses in Part C of its brief for a ruling that "Congress has completely occupied the field of social security disability benefits"and thereby preempted respondents' claims. (GB 38).

Petitioners err in building this argument on *Bush* v. *Lucas* (GB 42), for in that case, as shown above, this Court held that all of Congress' activity in the field of federal employee relations was *insufficient* to preclude a *Bivens* remedy, 462 U.S. at 378. *A fortiori*, petitioners cannot prevail here, where Congress has not "created a comprehensive scheme that was specifically designed to provide full compensation" for constitutional wrongs. *Id.* at 390 (Marshall, J., concurring). In *Bush*, congressional occupation of the field of federal employee

policy was material only because the special nature of federal employee relations constituted a "special factor[] counselling hesitation" in judicial inference of a *Bivens* remedy. *Id.* at 378, 380. The argument petitioners make in Part C of their brief is therefore incapable of standing alone; it must be buttressed by the special factors analysis offered in Part D, which is fatally flawed for independent reasons. *See* Part IV, *infra*. But a few words are appropriate here to demonstrate the failings of the Government's "occupation" argument.

It is not enough to say that "Congress has occupied the field," for the real question remains: "*Which* field?" The Court confronted this question in *Bowen* v. *Michigan Academy*, *supra*, and concluded that, although the "reticulated statutory scheme . . . carefully details the forum and limits of review of" determinations of the amount of Medicare benefits to be paid, the statutory scheme "simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 106 S.Ct. at 2138 (emphasis in original). Likewise, the elaborate statutory scheme Congress has enacted for determining eligibility for disability benefits speaks only to reviewing and correcting the determinations themselves, not to rectifying the injuries visited upon respondents when they were unconstitutionally forced to seek restoration of benefits that — as is beyond dispute — should never have been terminated in the first place. The "pre-empted field does not extend as far as [the defendants] would have it." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984).

The Government suggests that the more complex and comprehensive the apparatus for assuring restoration of benefits to deserving claimants, the less sense it makes to create an additional mechanism for redressing the injuries caused when benefits have been abusively withheld. With all due respect, that is absurd. The fact that Congress is deeply concerned with delivery of benefits to the truly disabled says nothing either way about what should be done when that congressional intention is frustrated by a program of official misconduct. Similarly, the fact that Congress addressed some of the very abuses

identified by respondents when it enacted the 1984 Social Security Disability Benefits Reform Act evinces congressional awareness that such abuses existed in the present and ought to be prevented in the future; but it says nothing about what should be done to compensate those who have already been harmed, or might be harmed if the abuses persist despite congressional directives.

It is always possible to assert that the legislative intent behind enactment of a reform program (or behind a statutory regime that corrects mistakes and averts injuries) is to occupy so broad a field as to preempt damages remedies for the harms that have occurred or that are anticipated. But "clear and convincing evidence," *Bowen* v. *Michigan Academy*, 106 S.Ct. at 2136, 2141, of such a legislative intent must be forthcoming, for this Court has always resisted attributing to Congress the desire to cut victims off from any possibility of collecting damages. *See, e.g., Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."); *see id.* at 263 (Blackmun, J., dissenting) (with respect to "compensatory damages," it "is inconceivable that Congress intended to leave victims with no remedy at all"). This reluctance is especially strong where, as here, abuses of executive power are at issue, for the Court will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Michigan Academy*, 106 S.Ct. at 2141.[43]

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[43] Moreover, to accept the Government's "occupation of the field" argument, one would have to treat the comprehensive character of the structure Congress enacted for distributing and restoring benefits as evidence of an intent to displace not only *federally*-implied but also *state*-implied damages actions. *See* n.29, *supra*. This Court has repeatedly resisted just such invitations. For example, Congress has enacted an even more complex and comprehensive system for distributing and regulating radioactive nuclear fuel, including a system for return of improperly transported radioactive materials to their proper locations. But that did not lead this Court to doubt that, when the improper use or leaking of such materials causes injury to interests protected by state law, states are free to award damages. *Silkwood*, 464 U.S. at 251. In this case, of course, the interests injured are created and protected not by state law but by

The Government points to nothing in the 1984 Reform Act (or in prior Social Security legislation) that even suggests — much less proves — that Congress meant to foreclose constitutional damages actions. The Government's contention that "Congress made perfectly clear when it passed" the 1984 Reform Act "that it was acting both to replace and to forestall [judicial] solutions" (GB 42-43, 48) is an exercise in obfuscation. The Government's citations to the legislative history identify passages where Congress expressed an intent to remove claims for disability benefits from the federal courts and remand them to the SSA, or an intent to preclude the certification of future class actions contesting benefit terminations made without application of a medical improvement standard. Obviously, such efforts to clear away the debris of widespread litigation contesting individual benefit terminations or challenging the substantive eligibility criteria in no way establish any congressional intention to prevent respondents — who did not go to the federal courts to regain their benefits — from seeking damages for the due process violations that compelled them to undergo the ordeal of the termination and review process.

If anything, the legislative history of the 1984 Reform Act indicates that Congress, cognizant of what it deemed to be due process violations attributable to SSA officials,[44] addressed its Reform Act to preventing future abuses, not to compensating for the consequences of past ones.[45] The prophylactic measures embodied in the 1984 Reform Act, like the benefit restoration process available under 42 U.S.C. § 405(g), do not compete or conflict with the *Bivens* remedy respondents seek; they complement it. *Cf. Carlson* v. *Green*, 446 U.S. at 22 n.9. In the absence of any "special factors counselling hesitation" in

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the Fifth Amendment of the Constitution — and the appropriate source of an implied damages remedy is federal law. *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

[44] *See, e.g.*, 130 Cong. Rec. H1959 (Rep. Conable); *id.* at H1965 (Rep. Hammerschmidt); *id.* at H1977 (Rep. Jeffords).

[45] *See, e.g.*, 130 Cong. Rec. S6224 (Sen. Bradley); 130 Cong. Rec. H1963 (Rep. Regula); *id.* at H1964 (Rep. Roybal); *id.* at H1974 (Rep. Dyson).

judicial inference of a *Bivens* remedy, there is no reason for concluding that Congress' will would be inconvenienced in the slightest, much less thwarted, by allowing respondents to proceed with their quest for compensation. It is to the issue of such special factors that we now turn.

IV. THERE ARE NO SPECIAL FACTORS MILITATING AGAINST JUDICIAL RECOGNITION OF A DAMAGES CLAIM IN THIS CASE.

This Court has advised that "inferring [a damages] action directly under the Constitution might not be appropriate when there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *United States* v. *Stanley*, 107 S.Ct. 3054, 3060 (1987) (quoting *Bivens*, 403 U.S at 396). None of the special factors previously recognized by the Court is present in this case, and the petitioners do not offer any plausible new candidates.

A. There is no possibility of interfering with the federal government's special relations with its employees.

This Court declined to recognize a *Bivens* action for violation of a government employee's First Amendment rights in *Bush* v. *Lucas* out of regard for Congress' primary role in shaping "federal personnel policy." 462 U.S. at 380-81; *see also id.* at 389-90. The Court was understandably unwilling to risk upsetting Congress' elaborate, continuing and delicate efforts to balance the competing concerns of efficiency, discipline, morale, free expression and open government. In fact, this special deference to the Legislature's expertise and demonstrable, supervening interest in the sensitive field of federal employee relations has been material to *every* case in which the Court has refused to create a new substantive legal liability without congressional aid, whether in the context of civilian employees, *see United States* v. *Gilman*, 347 U.S. 507, 509 (1954) ("[g]overnment employment gives rise to policy ques-

tions of great import" and "present[s] a myriad of problems with which the Congress over the years has dealt"), or in the context of the "necessarily unique structure of the Military Establishment," *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), where the Court has found "factors counselling hesitation" in the "need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice . . . ." *Id.*[46]

This special factor — present every time this Court has withheld availability of a constitutional cause of action for damages — is notably absent here. Petitioners and respondents do not share the sort of close, collaborative, continuing juridical relationship found in the federal civil service. Nor is the nature of their relationship as fraught with consequence as any in the unique disciplinary hierarchy of the armed forces. Here there are no sensitive issues of morale, employee efficiency or discipline, *cf. Bush*, 462 U.S. at 380; and no subtle issues involving the "complex of relations between federal agencies and their staffs," *Gilman*, 347 U.S. at 511. Those who receive disability benefits and those who administer the Social Security program are utter strangers: they do not have a relationship appreciably closer or more sensitive or more special than that between taxpayers and the Internal Revenue Service, or between retail cashiers and their steady customers.

B. There is no risk of usurping legislative power or of intruding on the congressional role in fiscal policy.

In *Bush* v. *Lucas* the Court referred to *Gilman* and *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), as cases involving "federal fiscal policy." 462 U.S. at 380. In *Standard Oil*, the government sought a cause of action against a party which had injured a federal employee and thereby caused the

[46] *See also United States* v. *Stanley*, 107 S.Ct. at 3063 ("congressionally uninvited intrusion into military affairs by the judiciary is inappropriate"); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947) (stressing unique character of "relation between the Government and . . . members of its armed forces").

government some expense. The Court viewed the damages remedy sought by the Executive Branch as an "instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail," 332 U.S. at 314. This Court refrained, noting that "Congress, not this Court or the other federal courts, is the custodian of the national purse" — and "the primary and most often the exclusive arbiter of federal fiscal affairs." *Id.* In *Gilman* the government likewise sought a new cause of action to replenish its coffers, this time a right of indemnity against an employee tortfeasor who had injured a citizen and thereby made the government liable in damages. The Court again declined the invitation. In both cases this Court took the position that, if Congress wished to augment the Executive's fiscal power by creating a new liability for which the public would answer, it was Congress' business to take that step — which it could do at any time. *See Standard Oil*, 332 U.S. at 314-17.

Thus, although neither *Gilman* nor *Standard Oil* presented a *Bivens* issue and both were substantially shaped by the previously discussed "special factor" of federal employee relations, *see Bush* v. *Lucas*, 462 U.S. at 379-80, it is plausible that a concern not to trench on congressional prerogatives of the purse could dissuade a court from inferring a *Bivens* action.

No such risk is presented by respondents' plea for a *Bivens* remedy. Such a damages action would not allow mandamus or injunctive or declaratory relief against the SSA that might augment the power of the federal courts and involve them in dictating eligibility criteria to the SSA or setting the size of benefit payments. This is the sort of interference that prompted Congress, when it passed the Reform Act of 1984, to bar certification of new class actions aimed at reshaping the substantive standards for termination of disability status (GB 42-43), and to caution the courts against intrusions that might prompt the outlays of disability payments to spiral out of control. (GB 48).

Nor is there any risk that the weight of *Bivens* awards will imperil the solvency of the disability insurance program: the cause of action respondents seek would lie against petitioners personally, not against the United States Treasury.[47]

[47] The Government's hypothesis (GB 48 n.29) that SSA might decide to indemnify its agents and officers is just that — hypothetical. There is no indication that it would do so and, in any event, that decision is not up to this Court.

C. The Government's attempt to treat "the sheer size of the Social Security system" as a special factor counselling hesitation should not be taken seriously.

The Court does not confront in this case any of the separation of powers concerns that animated prior "special factors" holdings: there is no risk of usurping congressional control over government finances or of interfering with the federal employment relations or the military matters that are essentially committed to the political branches. Recognizing that the circumstances of this case bear no similarity whatsoever to the prior contexts in which this Court has found "special factors," the Government offers a supposedly "special" factor of its own. The Social Security system, we are told, is so vast and complex as to boggle the mind and to put dread in the heart of any court that would dare to make any move that might threaten to bring the whole edifice crashing down on our heads. (GB 46). This is an appeal to ignorance — not to reason. Indeed, the "sheer size" argument is simply a capacious bin into which the Government tosses the usual hodge-podge of protests raised whenever government officials fear that they may be held to account for their actions.

(1) The Government fears administrative inconvenience and disruption from an onslaught of *Bivens* actions (GB 46-47), but outside the federal employment and military contexts that concern has not deterred this Court from recognizing claims of constitutional right,[48] especially when whatever disruption is entailed by enforcement of a right flows from the government's own misdeeds.[49] A degree of inconvenience is the price the government pays for its agents' wrongs and the price we all pay for constitutional government.

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[48] *See, e.g., First English*, 107 S.Ct. at 2389 ("such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities").

[49] *See Michigan Academy*, 106 S.Ct. at 2033 ("we are aware that administrative inconvenience may result from our decision today. But the Secretary had the capability and the duty to prevent the illegal policy" that the plaintiffs have challenged).

(2) The supposed deluge of *Bivens* claims (GB 46-47) will in all likelihood be a trickle, since plaintiffs seeking more than nominal damages[50] for an unconstitutional benefit termination must exhaust their administrative remedies, prove a deliberate abuse of government power rather than mere negligence or error,[51] and overcome the defense of qualified official immunity.[52] Moreover, the very prognosis that a future flood of genuinely troublesome due process claims would be unleashed by the availability of a *Bivens* remedy conflicts with the Government's confidence that Congress in 1984 brought the problem of SSA abuse under control. (GB 40-42). But the single best answer to petitioners' "deluge" argument is the one this Court has given when authorizing *Bivens* actions in the past:

> Judicial resources, [we are] well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles.

Davis v. *Passman*, 442 U.S. at 248 (quoting *Bivens*, 403 U.S. at 411 (Harlan, J., concurring in the judgment)).

(3) The Government's hand-wringing over the impact of personal damage liability on the morale and zeal of SSA officials (GB 47-48) is exaggerated. This case does not involve the special and sensitive context of government employee relations present in *Bush* v. *Lucas*. Indeed, the very presence of that special relationship made recognition of a *Bivens* remedy

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[50] *Cf. Carey* v. *Piphus*, 435 U.S. 247 (1978).

[51] *Cf. Daniels* v. *Williams*, 106 S.Ct. 662 (1986).

[52] *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Two of respondents' claims have already fallen to the immunity defense and other claims may do likewise if that defense is raised in the district court on remand.

in *Bush* arguably unnecessary, as well as arguably undesirable. The problem of violations of federal employees' constitutional rights was to some degree self-correcting: if rights of the staff were routinely abused, employee morale, loyalty, and efficiency would suffer. Government officials would therefore have a strong incentive to respect their subordinates' rights even without the threat of damages liability. In stark contrast, Congress' own investigations reveal that petitioners in this case had a powerful fiscal incentive to terminate respondents' entitlements without regard to their due process rights. A *Bivens* action is sorely needed to deter such deliberate abuses of power. *See Carlson* v. *Green*, 446 U.S. at 21.

Moreover, "[p]etitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate . . . [and], even if requiring them to defend respondent[s'] suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them [under this Court's cases] provides adequate protection." *Carlson*, 446 U.S. at 19. Beyond this, the petitioners' plea for shelter from personal damage liability amounts to a backdoor request for absolute immunity — something the Court has already rejected twice this month.[22]

(4) Perhaps the greatest difficulty with the Government's "sheer size" argument is that this "special factor" is not very special at all. It would apply whenever a plaintiff sought a *Bivens* action against employees of a large bureaucracy that frequently interacts with a lot of people: for example, the Federal Bureau of Prisons, *cf. Carlson* v. *Green*, or the FBI and other federal law enforcement agencies, *cf. Bivens*. And the Government's argument that *Bivens* actions would deter the zealous enforcement of eligibility criteria needed to keep the Social Security system solvent (GB 47-48) would extend with equal force to *Bivens* actions against agents of those other

[22] *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip. op. at 4 (judges performing administrative tasks); *accord*, *Westfall* v. *Erwin*, No. 86-714 (Jan. 13, 1988), slip. op. at 3 (nondiscretionary conduct of executive officials acting within the scope of their employment).

bureaucracies where timid enforcement of the rules might threaten the solvency of programs of transfer payments (e.g., the Veterans Administration) or even the solvency of the Federal Treasury itself (i.e., the Internal Revenue Service). The Government's "sheer size" factor has no substance and knows no limits.

CONCLUSION

Especially with respect to "the most flagrant and patently unjustified sort of [official] [mis]conduct . . . it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy . . . ." *Bivens*, 403 U.S. at 411 (Harlan, J., concurring in the judgment). The judicial remedy sought here is both traditional and narrow: it would apply only where (1) measurable damages flow from (2) deliberate violations of the (3) clearly established constitutional rights of (4) disabled victims who have (5) exhausted their administrative remedies. Even so, if bowing to the Government's open-ended appeal to "sheer size" in order to preclude this remedy did not yield a constitutionally troublesome result, perhaps the Court could defer to the Government's gambit. But the result of doing so would in fact be to leave serious constitutional grievances against a far-flung bureaucracy unredressable — and indeed unreviewable. First principles of our system of government teach that no such outcome can be countenanced absent the clearest congressional directive or the most compelling circumstances. But no such directive,

and no such circumstances, have been shown here. Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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January 22, 1988

REPLY

BRIEF

(6)

No. 86-1781

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD SCHWEIKER, ET AL., PETITIONERS

v.

JAMES CHILICKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief we explained that three doctrines well established in this Court's jurisprudence converge to make inappropriate the *Bivens* action respondents have brought here: explicit preclusion by Congress, the existence of a comprehensive alternative as was found in *Bush* v. *Lucas*, and special factors counselling hesitation. Section 405 creates an unusually comprehensive remedial scheme for the massive social security program, a scheme that Congress clearly intended to be exclusive and that would be gravely disrupted by the addition of a *Bivens* remedy. That scheme both in its literal terms and as interpreted by this Court in cases such as *Bowen* v. *City of New York* and *Califano* v. *Yamasaki* provides claimants with unusually liberal opportunities to present any grievances they may have and to obtain relief both for episodic and systematic departures from law.

No grounds of complaint—statutory or constitutional—are foreclosed from administrative and ultimately judicial review in ordinary course, particularly not the very ones of which these respondents complain. Thus it is hard to see why the heavy theoretical artillery of the Hart dialogue (Resp. Br. 34 n.38) dealing with precluding all judicial review of constitu-

tional claims has been called into action in this case. What the "unusually protective" (*Heckler* v. *Day*, 467 U.S. 104, 106 (1984)) review procedures in 405(g) do *not* do is offer claimants what at common law would be called consequential damages, limiting them rather, as in *Bush* v. *Lucas*, to reinstatement and retroactive benefits. See *Duke Power Co.* v. *Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978) ("statutes limiting liability are relatively commonplace and have consistently been enforced by the courts").

We acknowledge at the outset the distress that any person must feel at the instances of hardship recited by amici and respondents. In any system that processes over two million claims a year, mistakes such as those recounted can be completely avoided only by abdicating altogether responsibility for weeding out non-meritorious claims. However gratifying such an approach might be, its financial cost would be such that the overall level of benefits to all claimants would have to be cut drastically. Indeed it is something like that situation that Congress believed it faced when it mandated the Continuing Disability Review program in 1980. In a system which processes such a large number of cases, establishing classifications and presumptive frequencies is actuarially warranted and an inevitable tool of managerial control.[1] Where these systematic devices have proven either too lax or too harsh, the agency itself will often retune them on its own initiative; but where such internal correction is either inadequate or too slow in coming, Congress has not hesitated to intervene and modify the process. If the bureaucracy at any level fails to follow congressional directives, review and relief are available in court. Thus Section 405 provides ample means for correcting errors, whether individual or systemic. Little would be accomplished by allowing a parallel procedure which threatens government officials with ruinous personal liability and which may be invoked simply by adding

[1] See *Califano* v. *Boles*, 443 U.S. 282, 285 (1979) ("Fairness can best be assured by Congress and the Social Security Administration through sound managerial techniques and quality control designed to achieve an acceptable rate of error.").

adverbs of constitutional import to a complaint alleging the improper administrative and adjudicative handling of claims.

1. Respondents' and amicus ACLU's principal contention is that, by seeking to deny disability claimants a *Bivens* remedy in this context, petitioners are attempting to preclude all review of their due process claims. Such preclusion of review, they contend, would raise "serious questions" as to the constitutionality of the Social Security Act (see Resp. Br. 11, 21-26; ACLU Br. 6, 25-33). In fact, however, constitutional as well as statutory and evidentiary arguments are available to the terminated beneficiary under Section 405(g) in his effort to show that the termination was wrongful and that his benefits should be reinstated. In this case, respondents had their benefits fully reinstated following administrative review. They did not receive, because the statute does not provide, damages for emotional distress or indirect damages stemming from the loss of goods and services they could have bought with those benefits. But that respondents have not received all the relief that they would like does not suggest that review of their due process complaint has been precluded. That baseless contention is, however, the premise of every argument made by respondents and amici before this Court.

Respondents repeatedly assert (Br. 10-11, 17-18, 21, 24) that since their benefits never should have been taken from them in the first place, restoration of past and current benefits provides "no post-deprivation remedy at all for the constitutional violations they allege" (*id.* at 11). It merely returns "the disability benefits that all agree respondents should never have lost in the first place" (*id.* at 10). But the same argument could have been made on behalf of the plaintiff in *Bush* v. *Lucas*, 462 U.S. 367 (1983), who was denied a *Bivens* action as a supplement to the remedies provided him under the civil service laws. He should never have been demoted; but that does not mean that "mere" restoration of his position with back pay does not constitute redress for the constitutional violation. On the contrary, this Court in *Bush* concluded (462 U.S. at 368, 378 n.14) that such a remedy was both "constitutionally adequate" and sufficiently

"meaningful" to forestall a *Bivens* remedy. In this case, as in *Bush*, retroactive restoration of benefits is a remedy for the alleged constitutional violation, notwithstanding that it does not provide relief from every form of injury resulting from the improper action. If there were *no* remedy for the alleged constitutional violation which led to a loss of benefits, then obviously there would be *no* restoration whatsoever of those benefits.

Respondents seek to distinguish *Bush* in several ways. They contend (Br. 4) that the "system of review" provided by Congress in the SSA only provides a remedy for "cases involving mistaken denial or termination," while the civil service laws were "specifically designed" to provide remedies for constitutional violations (Br. 20). But this Court has clearly held that litigants can raise due process and other constitutional challenges to administrative action within Section 405(g). *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976); *Heckler* v. *Ringer*, 466 U.S. 602, 615 (1984). Moreover, 405(g) has been broadly interpreted to permit class actions for injunctive and declaratory relief for alleged constitutional violations. *Califano* v. *Yamasaki*, 442 U.S. 682 (1979); see also *Heckler* v. *Day*, 467 U.S. 104 (1984) (suit for state-wide injunctive relief for alleged due process violations cognizable under Section 405(g)).[2] Furthermore, the Court has construed the "final decision" requirement in Section 405(g) to permit an early resort to the courts on certain constitutional claims that are collateral to the claim for benefits where risk of irreparable harm exists (*Weinberger* v. *Salfi*; *Mathews* v. *Eldridge*), or based on allegations of systemwide abuse. *Bowen* v. *City of New York*, 476 U.S. 462 (1986). Respondents' assertion that 405(g) is so limited as to preclude any review of their allegations of constitutional violations and systematic abuse of the SSA process is therefore flatly belied by this Court's cases, as well as by their own complaint (see Amended Complaint para.

[2] In the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(d), 98 Stat. 1797-1798, Congress prohibited the certification of new classes on the issue of medical improvement. But other class actions were unaffected.

6), which sought injunctive and declaratory relief for their claims under 405(g).[3]

Respondents also argue that this case differs from *Bush* v. *Lucas* in that wrongfully terminated disability recipients suffer "categories of harm entirely independent of the sums withheld" (Br. 14-15). It is true that the hardship suffered by such persons will generally be greater than for fired civil servants, because a disabled person's inability to work and substantial personal expenses often leave him or her in a precarious financial condition. That hardship accounts for Congress's 1984 decision to permit terminated beneficiaries to continue to receive benefits

[3] Respondents also attempt (Br. 20) to distinguish *Bush* v. *Lucas* on the grounds that Bush could have been demoted or dismissed for such cause as would promote the efficiency of the service. Thus, "Bush's 'entitlement' to continued employment was decisively qualified" and "the remedies Congress afforded him * * * were available *only* because Congress had created" a remedial scheme designed to correct the alleged constitutional violation (*ibid.* (emphasis in original)). Respondents argue (Br. 20 & n.26) that their own reinstatement, by contrast, was "just a restoration of something to which [they were] entitled regardless of the government's interests and regardless of any showing of abuse."

Bush, however, had a statutory right to be dismissed only for "cause." That right is comparable to "the interest of an individual in continued receipt of [disability] benefits [which is also] a statutorily created 'property' interest protected by the Fifth Amendment." *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976), citing *Arnett* v. *Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring in part), and *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972). Thus, Bush's entitlement to continued employment provided there was no cause for dismissal was no more "decisively qualified" than respondents' right to continued benefits provided they were still disabled.

Amicus ACLU argues (Br. 6) that the 405(g) review process cannot possibly remedy respondents' wrongs because "respondents' alleged injuries flow from the Secretary's corruption" of that process. Since "the essence of respondents' charge is that the integrity of the administrative process has been corrupted by interests external and antithetical to the rule of law," the ACLU contends that a separate forum and a separate remedy must be provided for that claim. But even setting aside the fact that this supposedly "corrupt[]" process in fact restored respondents' benefits in full, this argument simply ignores the judicial review provision in Section 405(g) as interpreted by the series of cases discussed in text. Courts can and do consider under 405(g) constitutional challenges to the administrative process, including claims of systemwide abuse.

through the ALJ hearing stage. But it provides no support whatsoever for respondents' contention that restoration of benefits is "no post-deprivation remedy at all for the constitutional violations they allege" (Br. 11). Additional injuries proximately caused by an alleged wrong do not change the nature of the wrong alleged, and the fact that a particular remedy corrects only some, but not all of those injuries, does not change the fact that it provides some relief for the wrong in question. Respondents and amici seem to think that by drawing out the chain of causation they have created a new constitutional wrong that is not addressed at all by 405(g). That is plainly incorrect.[4]

[4] Respondents rely in part on a recent decision by this Court under the Takings Clause to support their assertion that Section 405(g) leaves unreviewable certain claims of constitutional wrongs, and therefore requires recognition of an implied constitutional remedy. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, No. 85-1199 (June 9, 1987). We do not read their brief as asserting a claim under the Takings Clause, and any such argument would obviously be untenable since no Takings Clause claim appears in respondents' complaint and none was ever raised or considered below. Respondents apparently seek to argue by analogy, however, that just as *First English* recognized a damage remedy under the Takings Clause for a temporary taking of property, there should be an implied cause of action of some sort for the temporary deprivation of disability benefits. The government is not "relieved of paying compensation for having temporarily taken someone's property so long as the property was eventually given back" (Br. 16). But that analogy is inappropriate as a justification for the present suit.

First English involved a claim against a county under the Takings Clause of the Fifth Amendment for the temporary deprivation of a traditional form of property, and this Court concluded that the constitution mandated that just compensation be paid. In this case a violation of the Due Process Clause is alleged and the remedy sought is damages from government officials in their personal capacity. There is no reason to suppose that the nature and measure of a money judgment under the Takings Clause carry over to all other constitutional provisions or translate in other contexts into a *Bivens* action against individual officials. Futhermore, no "takings" action could even be brought against the United States, much less an individual official, for a temporary loss of benefits where the "property" interest in question is wholly a creature of statute and the same statute that provides the benefits also sets the procedures that must be followed to recover terminated benefits. See, *e.g.*, *Nollan* v. *California Coastal Comm'n*, No. 86-133 (June 26, 1987), slip op. 7-8 n.2; *Bowen* v. *Gilliard*, No. 86-509 (June 25, 1987), slip op. 16-21; *Richardson* v.

2. In contesting our argument that Section 405(h) is an express declaration by Congress that the remedies it has provided in 405(g) are the exclusive mode of redress for a wrongful termination of benefits, respondents have simply provided the Court (Br. 27-37) with several additional variations on their contention that Section 405(g)'s denial of consequential damages denies them all redress for unconstitutionally wrongful benefit denials. "[R]eading § 405(h) to preclude federal question jurisdiction over those claims," they argue (Br. 33 (emphasis in original)) "denies respondents not only a damages remedy but *any judicial forum in which to challenge the petitioners' allegedly unconstitutional conduct.*" It is unnecessary to belabor this point further. Several observations are in order, however, concerning the specific operation of Section 405(g) and (h).

a. Respondents contend that the second sentence of Section 405(h)—providing that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided"—"has no application whatever" to their claims (Br. 29). They base this argument on *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 679 (1986), where this Court construed the phrase "decision of the Secretary" to mean those determinations made by "the Secretary after a hearing." Respondents argue that they are challenging not the decision of the Secretary after a hearing (which, in fact, restored their benefits) but rather "the initial abuses by state officials, acting under color of federal law, in unconstitutionally terminating their benefits in the first place" (Br. 28).

This argument ignores the clear intent of the first two sentences of 405(h) to "assure that administrative exhaustion will be required." *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975). In *Michigan Academy*, there was no administrative mechanism for challenging the regulation in question, and the Court therefore permitted review of the regulation under Section 1331 "because there is no hearing, and thus no administrative remedy

Belcher, 404 U.S. 78, 80-81 (1971); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960).

to exhaust" (476 U.S. at 679 n.8). Here, by contrast, there is an administrative remedy under Section 405(g) for abuses by state officials, and the only way respondents could challenge those abuses was by obtaining a "decision of the Secretary made after a hearing."[5] Once they have done so, the second sentence of Section 405(h) makes clear that, if still dissatisfied, they may seek judicial review, but only pursuant to 405(g) and only to the extent of the remedies provided by 405(g).

Alternatively, respondents contend (Br. 29) that *Michigan Academy* indicates that Section 405(h) has no application to attacks upon "[b]roadly applied policies and practices" of the Secretary. But that is plainly incorrect. In *Michigan Academy*, this Court emphasized that there was simply no statutory review procedure by which to present the constitutional challenge to the regulation at issue (476 U.S. at 681 n.12). By allowing such a challenge under general federal question jurisdiction, therefore, the Court "avoid[ed] the 'serious constitutional question' that would arise if we construed [the review provision] to deny a judicial forum for constitutional claims arising under Part B of the Medicare program" (*ibid.*). No such "serious constitutional question" arises here because respondents' challenge to the policies and practices of the Secretary are fully cognizable within Section 405(g), either in a class action for injunctive and declaratory relief (*Yamasaki*; *Heckler* v. *Day*) or through administrative proceedings followed by judicial review. Those practices and policies only affect respondents to the extent of a

[5] Allegations of systematic and unconstitutional abuse of the social security system might provide a basis for a waiver of the exhaustion requirement permitting an immediate resort to federal court on those claims, either in a class action or at the behest of an individual beneficiary. See *City of New York*, 467 U.S. at 482-486; *Mathews* v. *Eldridge*, 424 U.S. at 328-332; *Weinberger* v. *Salfi*, 422 U.S. at 763-767. This Court's cases make clear, however, that such a suit would still fall within the broad boundaries of Section 405(g). *City of New York*, 476 U.S. at 484-485; *Mathews* v. *Eldridge*, 424 U.S. at 327; *Weinberger* v. *Salfi*, 422 U.S. at 757. Thus, although declaratory and injunctive relief would be available, the sole monetary remedy for an unconstitutional termination of benefits based on allegations of systematic abuse of the system would be restoration of those benefits and an award of back benefits.

denial of their benefits at some stage of the process. Injunctive or declaratory relief reforming this process in general or a reversal of a particular decision is therefore a remedy for the alleged wrong, notwithstanding that consequential damages are not provided by the statute.[6]

b. Respondents also contend (Br. 31) that we have advanced an "indefensibly expansive reading" of the third sentence of Section 405(h), which bars federal question jurisdiction on any claims "arising under" the Social Security Act. Their claims, they assert, do not arise under the Act because they seek a form of relief not provided by the Act. This case, however, "arises under" the Act because Section 405(g) provides a remedy for the wrongful termination of benefits, whether the legal error is statutory or constitutional in nature. *Weinberger* v. *Salfi*, 422 U.S. at 760-761. Certainly a claim for restoration of benefits, alleging a violation of due process, would have to proceed under 405(g) because due process claims are fully cognizable within 405(g) (*Mathews* v. *Eldridge*).

The nature of the relief sought does not change the character of the alleged wrong (cf. *Davis* v. *Passman*, 442 U.S. 228, 244 (1979) (the existence of a constitutional claim does not settle the further question of "whether a damages remedy is an appropriate form of relief")), and it cannot be allowed to determine whether a claim arises under the Act. Consequential damages in a *Bivens* suit are a form of relief available on some constitu-

[6] Incredibly, respondents argue (Br. 32-33) that because they prevailed at the administrative level they were somehow cheated out of a *judicial* decision that their constitutional rights were violated. They contend that this Court should provide an implied action for additional damages simply in order to give them Article III standing to continue to pursue their claims in federal court. Respondents have put the cart before the horse, arguing not as most litigants do that they have standing because they are entitled to damages but rather that they must be entitled to damages so as to give them standing. We need not, however, be in such a rush to inject the federal courts into every dispute. Constitutional arguments of the sort made by petitioners may be fully aired in court either when the "decision of the Secretary" is adverse to the claimant or, in circumstances in which exhaustion is properly waived, in a Section 405(g) suit brought immediately upon the termination or threatened termination of benefits.

tional claims; but the request for such relief is not itself a "claim" in the sense that term is used in Section 405(h). Respondents' *claim* is that their benefits were terminated without due process, and the third sentence of 405(h) makes clear that such a claim cannot give rise to a suit under Section 1331 but can only proceed pursuant to, and result in the remedies provided by, Section 405(g). Thus, the proper inference is not that the unavailability of consequential damages for due process violations under 405(g) makes them available under 1331; it is that they are not available at all.

Respondents correctly point out (Br. 15) that the prior decisions of this Court applying Section 405(h) "all dealt with attempted end-runs by plaintiffs seeking benefits." The plaintiffs in those cases were trying to get a court to award them benefits without first exhausting their administrative remedies. See *Heckler* v. *Ringer; Mathews* v. *Eldridge; Weinberger* v. *Salfi.* Respondents, by contrast, have already had their benefits restored in full by the administrative process. But respondents still propose an end-run around the social security system constructed by Congress. It is simply a broader and more audacious end-run than any this Court has hitherto considered. Respondents are not seeking "premature judicial intervention" in the statutory scheme (Br. 36); they are seeking complete judicial reconstruction of the remedies provided by Congress. Congress could have provided within Section 405(g) for a restoration of benefits with interest or for other consequential damages to recompense the interim loss. But it did not. And Section 405(h) plainly states that such additional awards are therefore precluded. Congress could not have more expressly stated that "[n]o action" may be brought under Section 1331 (which is the sole jurisdictional predicate for a *Bivens* action) against "*any* officer or employee" on "*any* claim arising under" the Act (emphasis added).[7]

[7] The final argument respondents make against the express congressional channelling of their claims into Section 405(g) is that "nothing in the Social Security Act or its legislative history • • • even suggests Congress was addressing remedies for governmental abuses of power" (Br. 30). This argument is just another variant on the claim that Section 405(g) does not permit an attack on "governmental abuses of power" that lead to a termination of benefits. But Section 405(g) clearly does permit such an attack and Congress therefore expressly addressed the appropriate remedies for such claims when it enacted Section 405(g) and (h).

3. Respondents offer two primary arguments bearing on our contention that Congress, in the Social Security Act, has sufficiently occupied the field to render "inappropriate," even apart from Section 405(h), the implication of "a new judicial remedy" (*Bush* v. *Lucas*, 462 U.S. at 368).

a. Respondents' principal argument (Br. 43-44) is that the reasoning of *Bush* v. *Lucas* has no significance beyond the limited context of federal employment. But the principle established in *Bush* v. *Lucas* cannot be so limited. The "special factor" repeatedly stressed by the Court in *Bush* v. *Lucas* was not the employment relationship, but the fact that that relationship was "governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" (462 U.S. at 368). See also *id.* at 385, 386, 388.[8] As a result, the Court stated the question at issue in that case in general terms, as "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue" (*id.* at 388). That same exact question is posed in this case.

Unlike in *Bivens* and *Davis* v. *Passman*, the question here is "not what remedy the court should provide for a wrong that would otherwise go unredressed" (*Bush* v. *Lucas*, 462 U.S. at 388). Congress has provided a remedy in the form of reinstate-

[8] In *Davis* v. *Passman*, 442 U.S. 228 (1979), a federal employment relationship was also at issue, but the Court did not find that relationship, in the absence of a scheme of remedies for constitutional violations, to be a "special factor" sufficient to forestall a *Bivens* remedy. Rather, the Court stressed (442 U.S. at 247) that congressional employees had been specifically excluded from the remedial scheme available to other federal employees. Thus, "[f]or Davis, as for Bivens, 'it [was] damages or nothing.' " *Id.* at 245 (footnote omitted) (quoting *Bivens*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

ment with back benefits. Thus, respondents are again off the mark when they argue (Br. 41 (quoting *Michigan Academy*, 476 U.S. at 671)) that for the Social Security Act to preempt a *Bivens* remedy " 'clear and convincing evidence' • • • of such a legislative intent must be forthcoming, for this Court has always resisted attributing to Congress the desire to cut victims off from any possibility of collecting damages."

It is true, as this Court has noted, that "[a]s a general matter, the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Michigan Academy*, 467 U.S. at 674 (internal quotation marks omitted). But the acts in question here, the alleged due process violations, *are* reviewable under Section 405(g).[9] Congress has simply limited the scope of redress available to those affected by such actions, and no special proof of congressional intent should be necessary to give effect to that limitation beyond the fact that the legislative scheme is comprehensive and provides a "meaningful" and "constitutionally adequate" remedy.

The case is also plainly distinguishable from *Carlson* v. *Green*, 446 U.S. 14 (1980), where, although Congress had provided a remedy for the wrong in question under the Federal Tort Claims Act, the legislative history made it "crystal clear" that Congress intended victims of the sort of intentional wrongdoing alleged there to have both a *Bivens* action and an action under the FTCA against the United States (*id.* at 20). Here, by contrast, no indication is to be found in the legislative history of the SSA or any of its amendments that Congress thought it was providing anything other than a complete and exclusive remedy for wrongful (whether unconstitutional or merely mistaken) terminations of disability benefits.

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[9] This case is, therefore, much easier than either *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 8, or *NLRB* v. *United Food & Commercial Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 18, in which the Court recently concluded, based on the comprehensiveness of the statutory schemes in question, that by providing an avenue of review for certain claims Congress must have intended to preclude such review for some other claims not covered by the review provision.

b. Contrary to the general thrust of respondents' brief, the remedy provided by Congress in Section 405(g) for an unconstitutional termination of benefits is not constitutionally deficient. This remedy precisely parallels the remedy at issue in *Bush* v. *Lucas*, which the Court found to be meaningful and constitutionally adequate, and which respondents frankly acknowledge (Br. 15 n.18) "fully restored" Bush's "reputation and his financial fortunes." Any difference between this case and *Bush* can only lie in the measure of the hardship suffered by respondents because of their already precarious financial condition and their physical inability to work. That hardship may be appreciable. But this Court has already held in *Mathews* v. *Eldridge* that the fact that restoration with back benefits does not constitute "full relief" for a wrongful termination of disability benefits does not render the remedial scheme constitutionally infirm. The plaintiff in *Mathews* (424 U.S. at 331 (footnote omitted)) also "raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." The Court nonetheless concluded that a post-deprivation hearing with subsequent restoration of benefits was sufficient to satisfy the dictates of due process. It follows that the restoration of respondents' benefits following a hearing was a constitutionally adequate and meaningful remedy for the wrongful termination of those benefits by the state agency.

Moreover, since *Mathews* v. *Eldridge*, several of this Court's cases have construed the remedy available under Section 405(g) in ways demonstrating its flexibility and capacity to deal with claims of potentially irreparable harm stemming from unconstitutional action by the agency. This Court recognized in *City of New York*, 476 U.S. at 483, that a wrongful termination carries with it the prospect of irreparable harm and, as a consequence, relaxed the exhaustion requirements of 405(g) and permitted an immediate challenge to an "internal policy of the Secretary of [HHS] that had the effect of denying benefits to numerous claimants who may have been entitled to them" (476 U.S. at 469). Section 405(g) also permits nationwide class

actions and injunctive relief (*Califano* v. *Yamasaki*, 442 U.S. at 705). And the Court has construed the statutory "final decision" requirement in Section 405(g) to permit challenges to "an unlawful, unpublished policy" (*City of New York*, 476 U.S. at 473), as well as early resort to the courts where the claimant asserts a due process right that would be irretrievably lost if judicial review were postponed until after he fully exhausted his administrative remedies (*Mathews* v. *Eldridge*). This relaxation, this broadening of the types of and avenues to relief under 405(g), further indicates that respondents have a meaningful remedy for unconstitutional terminations without the overlay of a *Bivens* cause of action.

Congress recognized that claimants might experience financial hardship while they pursued their administrative remedies (*Heckler* v. *Ringer*, 466 U.S. at 627), and acted in 1984 to relieve that hardship in certain circumstances.[10] But Congress has continued to regard a retroactive award of benefits at a later stage of the administrative process as a fully adequate remedy for an erroneous denial of benefits at a preliminary stage of that process. See *Mathews* v. *Eldridge*, 424 U.S. at 339-340. "If the balance is to be struck anew, the decision must come from Congress and not from this Court." *Heckler* v. *Ringer*, 466 U.S. at 627.

4. We argued in our opening brief that the size of the various social security programs constitutes an additional "special factor" counselling against judicial recognition of a *Bivens* remedy. Respondents, by contrast, attempt (Br. 2-3 n.2, 47) to minimize the practical consequences of the remedy they seek and contend (*id.* at 46) that, in any event, such "inconvenience" is a small price to pay for "constitutional government." But to permit disappointed claimants the option of a *Bivens* remedy in addition to the Section 405(g) procedures for restoring their benefits could not be carefully limited as respondents suggest. And the price we would pay for such additional relief

[10] Congress recently extended the interim benefits provision for another year, through 1988, in Section 9035 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987).

would be a complete disruption of this carefully crafted and constantly monitored congressional scheme.

This Court has noted that the SSA hearing system is " 'probably the largest adjudicative agency in the western world.' " *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted). The size and extent of the administrative structure, coupled with the fact that its adjudicative function inherently spawns disagreement over results, suggest that it would be rendered unworkable by the overlay of a *Bivens* remedy.[11] Nothing could be easier than to append to a claim that one's benefits were wrongfully terminated or withheld an additional claim that the responsible official was guilty of an "intentional disregard of dispositive favorable evidence," or a "failure to review impartially adverse decisions," or an "arbitrary reversal of favorable decisions" or a "denial of benefits based on the type of disabling impairment" (Pet. App. 13a-14a). Indeed, these are just ways of saying, with a rhetorical emphasis all too familiar to respondents, that the official got it wrong.[12]

The absolute immunity that protects administrative law judges, *Butz* v. *Economou*, 438 U.S. 478, 508-517 (1978), would probably not reach state officials making the initial ter-

[11] Even on their own count of persons whose benefits were terminated and later reinstated (see Resp. Br. 6), respondents would have the Court authorize 200,000 *Bivens* claims arising simply out of the operation of the continuing disability review program between March 1981 and September 1984. At $30,000 per claim (which respondents seek "at a minimum"), the potential *personal* liability of petitioners and their successors during that period is $6 billion.

Amicus NMHA, *et al.* (Br. 27) blithely assures the Court that "a few successful *Bivens* actions against petitioners will no doubt keep petitioners on their toes and result in a decreasing number of lawsuits against them." Such personal liability will not keep anyone "on their toes." It will either knock them off their feet or send them running to the private sector. With well over 75 million beneficiaries of the various social security programs, defending *Bivens* actions would become a full-time job in itself for the head of HHS. No one could be found, either rich enough or poor enough, to sustain such a position.

[12] Nor does it add anything to insist with emphasis that such errors were not negligent or inadvertent. Adjudicative or administrative determinations, if erroneous, are rarely if ever "inadvertently" so.

mination decisions and higher officials (like petitioners) who are setting policy (*id.* at 512). Yet the same considerations that counsel in favor of absolute immunity for judges, prosecutors and ALJs counsel against creation of a *Bivens* remedy in this context. "The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus," and fear of the devastating potential liability attendant upon such a claim would inevitably "harrass[] and intimidat[e]" agency officials (*ibid.*), thereby skewing an adjudicative process that Congress has taken great pains to define. Furthermore, the safeguard of judicial review and "the correctability of error on appeal" are sufficient "checks on malicious action" by agency officials responsible for the adjudication without "the need for private damages actions as a means of controlling unconstitutional conduct" (*ibid.*).[13]

The 1984 SSA amendments, which permit terminated beneficiaries to receive benefits from the time of the initial determination through the ALJ hearing stage, would not substantially limit the adverse effects of a *Bivens* remedy. From the ALJ decision on, any adverse decision could give rise to a *Bivens* claim, and every benefit denial claim brought to court

[13] Indeed, it is not at all clear that, in an adjudicatory setting with meaningful appellate remedies, respondents' factual allegations make out any claim at all under the Due Process Clause. The demands of due process are satisfied by the existence of an adequate post-deprivation remedy (*Mathews* v. *Eldridge; Parratt* v. *Taylor*, 451 U.S. 527, 537-544 (1981)), and at least in an adjudicatory setting there is no reason for that principle to vary depending upon whether an intentional or a merely negligent deprivation is alleged to have occurred. A termination of benefits is wrongful regardless of the motive of the decision-maker if, under the SSA, the recipient is statutorily entitled to such benefits. But no deprivation of property in this context is final, so as to trigger the Due Process Clause, until the statutorily required review process has been exhausted. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985) (no taking of property by zoning commission until administrative remedies have been exhausted). If such exhaustion would cause irreparable harm, then exhaustion may perhaps be waived under 405(g). But that is just a further indication that it is not necessary to transform a statutorily wrongful termination of benefits into a due process violation in order to ensure an adequate post-termination remedy.

under Section 405(g) would be bound to contain an additional claim for *Bivens* damages under Section 1331. Furthermore, consequential damages for attorneys' fees and for emotional distress might not be limited to cases in which benefits were actually terminated. Thus, in their Amended Complaint (para. 241), the original plaintiffs in this case made clear that they were seeking damages for costs and for emotional distress notwithstanding that some of those plaintiffs never had their benefits interrupted for a moment. Damages for emotional distress might not be limited even to cases in which benefits were wrongfully terminated. See *Carey* v. *Piphus*, 435 U.S. 247, 263-264 (1978) (damages for emotional distress may be available under Section 1983 upon proof that the injury resulted from a violation of procedural due process even though the adverse substantive action turned out to have been justified).

In a massive adjudicatory system of this sort, the ballast can easily shift, permitting too many or too few claims. The only remedy for such overbalancing is a push in the other direction. Congress gave one such push in 1980 and another, in the opposite direction, in 1984.[14] The problem of how tightly or loosely the system should be administered is in essence political, susceptible to political solutions. Policy-makers may not barter away the due process rights of beneficiaries. But they may define the conditions upon which entitlement arises, and the administrative procedures through which terminated benefits may be restored.[15] Fundamental changes in the procedures

[14] Respondents' citations (Br. 5-8) to the statements of individual senators and congressmen during the debates on the 1984 amendment, indicating that the agency purged the rolls with undue zeal, can be matched with statements from the debates on the 1980 amendments, indicating that the agency was unduly lax in keeping persons on the rolls who were not disabled. See, *e.g.*, 126 Cong. Rec. 1196 (1980) (remarks of Sen. Long); *id.* at 1390 (remarks of Sen. Long); *id.* at 1407-1408 (remarks of Sen. Bellmon); 125 Cong. Rec. 23383 (1979) (remarks of Rep. Pickle). See also 42 U.S.C. 421(c)(2) and (3) (requiring SSA to review 65% of initial decisions made in favor of claimants); *Heckler* v. *Day*, 467 U.S. at 117.

[15] Respondents' contrary claims (Br. 5) notwithstanding, the floor debate on the 1984 amendments does not manifest any belief on the part of Congress

established by Congress—through which the courts can award back benefits and issue injunctions, but not award consequential damages—must await further action by Congress. The remedy for an essentially political disagreement over how tightly or loosely the system should be administered does not lie in a suit for personal damages against the head of the agency.

The decision of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

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that the agency was guilty of widespread due process violations. Rather, the debate centered on the so-called "medical improvement" issue: whether a beneficiary is entitled to a "presumption" of continued disability so that some improvement must be proved prior to termination, as many courts held (see Pet. Br. 14-15 & n.6), or whether, as the Secretary had steadfastly maintained, the continuing eligibility inquiry should focus on whether the claimant's current condition satisfies the applicable standards. Congress also debated the Secretary's nonacquiescence in adverse judicial precedent. See 130 Cong. Rec. H9834-H9838 (daily ed. Sept. 19, 1984); *id.* at S11452-S11470; 130 Cong. Rec. S6207-S6241 (daily ed. May 22, 1984). Congress resolved these controversies by adopting a middle ground on the medical improvement issue (see Pet. Br. 15-16 n.8) and by declining to take any position at all on nonacquiescence. H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 36-38 (1984). Those issues, it should be stressed, are no longer in this case.

There is no indication in the legislative history that Congress thought the Secretary was using secret quotas, or biased physicians or was black listing particular disabilities. To the contrary, the Senate Finance Committee noted that the 1984 amendments were necessary simply because "[t]he transition from a too loosely administered program with few post-entitlement reviews to a more tightly administered program with regular periodic reviews revealed weaknesses and ambiguities which need[ed] to be dealt with." But, the Committee stressed, "[i]t is the purpose of the Committee bill to deal with these problems while continuing the Congressional insistence that this program be tightly and carefully administered." S. Rep. 98-466, 98th Cong., 2d Sess. 6 (1984).

U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60282

AMICUS CURIAE

BRIEF

No. 86-1781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD SCHWEIKER, *et al.*,

Petitioners,

—v.—

JAMES CHILICKY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ARIZONA CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1/]

The American Civil Liberties Union (ACLU) is a nationwide non-profit organization of over 250,000 members dedicated to preserving and protecting the liberties secured by the Bill of Rights. The Arizona Civil Liberties Union is its statewide affiliate. Among the most cherished of those freedoms, "ingrained in our national traditions and [] designed to maintain them," Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951)(Frankfurter, J., concurring), is respect for and adherence to due process of law. This Court has described the due process clause as the "primary and indispensible foundation of individual

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1/ Letters of consent to the filing of this brief are being lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

freedom" and the "basic and essential term in the social compact which defines the rights of the individual . . . ." In re Gault, 387 U.S. 1, 20 (1967).

The ACLU has participated in many of the leading decisions by which this Court has given depth and meaning to the mandates of due process of law. E.g., Goss v. Lopez, 419 U.S. 565 (1975); Morrissey v. Brewer, 408 U.S. 471 (1972); In re Gault, 387 U.S. 1 (1967). As this Court has repeatedly recognized, one of the essential tools for enforcing the right to due process is the "traditional judicial remedy," Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 399 (Harlan, J., concurring), of damages. The Secretary's position in this case is directly contrary to that tradition.

SUMMARY OF ARGUMENT

At issue in this case is the Secretary's claim that the Social Security Act prohibits recovery of compensatory damages for injuries that were not and could not be redressed by the administrative process because of the Secretary's alleged interference with and subversion of that process. In resolving this issue, the Court must assume, as the complaint alleges, that petitioners have knowingly authorized a "quota system" under which the disability benefits of a minimum number of Social Security recipients must be terminated within prescribed periods of time.2/ If this allegation is true -- and

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2/ For purposes of review, the Court is bound to accept the well-pleaded factual allegations in the complaint as true. E.g., Papasan v. Allain, 478 U.S. ___, 106 S.Ct. 2932, 2943 (1986); Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 172 (1967).

(continued...)

evidence adduced elsewhere appears to support it[3] -- the Secretary's conduct

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2/ (...continued)
Here, the complaint alleges that "the Secretary and the Commissioner have ordered, authorized or knowingly sanctioned use of a 'quota' system in disability review cases whereby a minimum number of OASDI and SSI recipients in each federal region must be terminated from the programs within certain periods of time." Compl. at ¶270. The "quota system" is alleged to "require[] such action regardless of whether terminations in individual cases are supported by law or substantial evidence." Id. at ¶271.

The complaint further describes various means by which this quota system is claimed to operate. Thus, respondents allege that "SSA officials routinely approve the adverse decisions of DDS staff without conducting an independent review of pertinent records," id. at ¶217, and that petitioners have "adopted and enforced a nationwide policy of terminating the largest possible number of OASDI and SSI entitlements in an attempt to reduce federal expenditures for those programs," id. at ¶220.

3/ Cognate litigation in other courts documents pressures imposed by the Secretary on Administrative Law Judges to reduce the number of decisions granting benefits. See Association of Administrative Law Judges v. Heckler, 594 F.Supp. 1132, 1142 (D.D.C. 1984)("ALJs could reasonably feel pressure to issue fewer allowance decisions"); Hummel v. Heckler, 736 F.2d 91, 94 (3d Cir. 1984)(if allegations of the ALJs "are (continued...)

demonstrates an egregious disregard for due process of law.

Ignoring the nature of respondents' alleged injuries, the Secretary contends that the existence of an administrative process for the recovery of benefits is sufficient to defeat respondents' due process claim, no matter how subverted that process may have been by the Secretary's

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3/ (...continued)
substantially accurate, the impartiality of administrative law judges . . . might reasonably be questioned"); Stieberger v. Heckler, 615 F.Supp. 1315, 1396 (S.D.N.Y. 1985), rev'd on other grounds sub nom. Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986). A survey conducted in 1982 found, in response to the question whether "tacit agency pressure" had been placed on ALJ's by the Social Security Administration, that "77.1 percent of the judges agreed that the agency was pressuring them to reduce their allowance rates." Report of Senate Comm. on Governmental Affairs, Subcomm. on Oversight of Government Management, 98th Cong., 1st Sess., The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program 35 (Comm. Print 1983).

own actions. This unprecedented claim is devoid of merit.

First, respondents' alleged injuries flow from the Secretary's corruption of the administrative process; by definition, therefore, they cannot be compensated by that process. The loss of respondents' due process rights is separate and distinct from the loss of their disability benefits. Conversely, restoration of their disability benefits does not remedy the due process violation they suffered.

This Court has never sanctioned the foreclosure of all relief for constitutional injury. To the contrary, this Court and other courts have repeatedly held that relief must be available when constitutional rights are abridged, and have consistently construed congressional enactments to permit such recovery.

Second, the legislative history and historical context surrounding enactment of §§205(g) and (h) of the Social Security Act, 42 U.S.C. §§405(g) and (h), make it clear that Congress did not intend to foreclose judicial relief for the injuries alleged in this case. Keenly aware of this Court's decisions requiring the availability of judicial relief for claims of constitutional right, the 76th Congress expected and intended that claims founded on the Constitution, in which benefits were not sought, would proceed unimpeded under the general federal question jurisdiction.

ARGUMENT

I. RESPONDENTS HAVE SUFFERED INJURIES FOR CONSTITUTIONAL WRONGS THAT ARE SEPARATE AND DISTINCT FROM ANY INJURY CAUSED BY THE LOSS OF STATUTORY BENEFITS AND FOR WHICH A JUDICIAL REMEDY MUST BE PROVIDED

Respondents have unquestionably suffered grievous injuries caused by the termination of their disability benefits.[4/] In addition to these palpable economic losses, however, respondents have also suffered distinct and actual injuries caused by unconstitutional agency action separate and apart from any losses attributable to termination of their benefits.

4/ The complaint alleges that respondents depended on OASDI or SSI benefits as their sole or primary sources of income, Compl. at ¶232, and lacked any regular income after termination of their benefits, id. at ¶234. They are alleged to have suffered the loss "of food, shelter and other necessities." Prayer for Relief at ¶8.

In some, but not all cases, the independent injury caused by a violation of due process lacks the precision associated with economic loss. Nevertheless, as four members of this Court have noted, it would be "'facile to suggest that no damage is done.'"[5/] Moreover, even if the injury were not "reasonably quantifiable," an award of nominal damages would be warranted. Carey v. Piphus, 435 U.S. 247, 266 (1978); Memphis Community School District v. Stachura, ___ U.S. ___, 106 S.Ct. 2537, 2542-46 & n.11 (1986); Ellis v. Blum, 643 F.2d 68, 83-84 (2d Cir. 1981) (Friendly, J.)(nominal damages available in Bivens action against Social Security Administration).

5/ Memphis Community School District v. Stachura, 477 U.S. ___, 106 S.Ct. 2537, 2547 (1986)(Marshall, J., concurring in judgment)(quoting Dellums v. Powell, 566 F.2d 167, 195 (D.C.Cir. 1977)).

The Secretary urges a construction of the Social Security Act that would foreclose recovery of the actual injuries caused by unconstitutional agency action. This Court has, to be sure, sanctioned the substitution by Congress of an alternative, adequate remedy to redress a constitutional wrong. Bush v. Lucas, 462 U.S. 367 (1983). But neither this Court nor Congress has ever foreclosed all recovery for injuries occasioned by unconstitutional governmental conduct.6/ To the contrary, on several occasions the Court has noted the "serious constitutional question" that would be raised by such a statutory scheme.7/

In order to demonstrate the constitutional difficulties that the Secretary's position would engender, we examine the nature of respondents' claims and the injuries thereby incurred in some detail. As set forth below, respondents have suffered constitutional injuries that were not and could not be compensated by the administrative process.

A. Nature Of The Due Process Violation

The Fifth Amendment to the United States Constitution commands that no person shall be deprived of liberty or property

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6/ If accepted by this Court, the Secretary's legal argument in this case would, in effect, create an absolute immunity insulating the government from any liability for its unconstitutional actions in the Social Security context, no matter how egregious they might be. For sound reasons, "[t]his Court has generally been quite sparing in its recognition of claims to absolute immunity." Forrester v. White, No. 86-761 (Jan. 12, 1988), slip op. at 5.

7/ E.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. ___, 106 S.Ct. 2133, 2141 n.12 (1986); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Johnson v. Robison, 415 U.S. 361, 366-67 (1974); see note 19, infra.

without due process of law. The right of the elderly or disabled to continued receipt of Social Security disability benefits is, of course, a valued and protected property interest. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Termination of these benefits -- here respondents' only source of regular income -- must therefore be occasioned by timely and adequate notice of the reasons for termination and a meaningful opportunity to be heard.[8/] Although this Court held in Eldridge that the opportunity for hearing mandated by the Fifth Amendment may occur after the suspension of Social Security

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8/ Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970); see e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-45 (1985); Goss v. Lopez, 419 U.S. 565, 579 (1975); Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 339-42 (1969).

disability benefits,[9/] 424 U.S. at 332-49, the Court has consistently required and, indeed, assumed that the hearing process would be fair, regular, and impartial. E.g., Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

Due process imposes a complex of safeguards intended to protect the neutrality and fairness of this procedure. At a minimum, the hearing officer must remain impartial and free of external compulsion or influence. Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43

9/ Recognizing the severe hardship occasioned by wrongful termination of disability benefits, Congress later provided for receipt of interim benefits until the ALJ's decision is rendered. 42 U.S.C. §423(g). As respondents' brief notes, the principal effect of this amendment is to undermine the Secretary's suggestion that recognition of a damage remedy in these circumstances would lead to a significant expansion of litigation.

(1980).10/ Decisions of the hearing officer must be rendered solely on applicable rules of law and on the evidence adduced at the hearing, Goldberg, 397 U.S. at 271. Ex parte communications are therefore prohibited. 5 U.S.C. §557(d)(1). Likewise, Congress may neither exclude consideration of any element essential to the hearing officer's decision, see Bell v. Burson, 402 U.S. 535, 541-42 (1971), nor compel the making of findings that are unsupported by or contrary to the evidence, see Tot v. United States, 319 U.S. 463, 466-72 (1943).

10/ See Connally v. Georgia, 429 U.S. 245, 247-50 (1977); Ward v. Village of Monroeville, 409 U.S. 57, 59-62 (1972); Tumey v. Ohio, 273 U.S. 510, 523, 531 (1927); Taylor v. Hayes, 418 U.S. 488, 496-500 (1974); Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973); Morrissy v. Brewer, 408 U.S. 471, 485-86 (1972); Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971); In re Murchison, 349 U.S. 133, 136-39 (1955).

These bulwarks of the "neutrality requirement" are intended "to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law," Jerrico, 446 U.S. at 242, while "preserv[ing] both the appearance and reality of fairness . . . ." Ibid. In short, they are designed to safeguard the integrity of the administrative hearing process, which is the foundation for this Court's decisions sanctioning the use of administrative hearing procedures.11/

11/ A belief in the integrity of the administrative hearing process was central to this Court's early decisions sustaining delegation of the fact-finding function to administrative agencies. E.g., National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46-47 (1937); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49-50 (1938). That requirement continues to play a vital role in this Court's analysis. E.g., Mathews v. Eldridge, 424 U.S. at 345-46, 49 (prescribed procedures "provide the claimant with an effective process for asserting his claim prior

(continued...)

Respondents have alleged that the Secretary compromised the integrity of the adjudicative process by imposing a "quota system" requiring the termination of minimum numbers of disability recipients from federal programs -- "regardless of whether terminations in individual cases are supported by law or sufficient evidence." Compl. at ¶¶270, 272. Although such a "quota system" would obviously engender a variety of subsidiary statutory and constitutional violations -- many of which are also alleged in the complaint -- the essence of respondents' charge is that the integrity of the administrative process has been corrupted by interests external and antithetical to the rule of law.

11/ (...continued)
to any administrative action").

Respondents' allegations are therefore akin to -- and indeed more serious than -- a hearing officer's financial interest in the outcome of a hearing. See Connally v. Georgia, 429 U.S. 245, 247-50 (1977); Ward v. Village of Monroeville, 409 U.S. 57, 59-62 (1972); Tumey v. Ohio, 273 U.S. 510, 523, 531 (1927). What is mere inducement in the case of financial interest is alleged to be compulsion here. And like the corrupt influence wielded by financial interest in the outcome of an adjudicative proceeding, the unconstitutionality alleged in this case cannot be cured by subsequent neutral hearings or by reversal on appeal. As this Court observed in Ward, "the State's trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication.

Petitioner is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61-62 (footnote omitted, emphasis added).

In sum, the gravamen of respondents' contention is that during the pendency of their administrative proceedings, and before their benefits were restored, a constitutional infirmity in the administrative process that caused them serious injury. Bush v. Lucas, 462 U.S. 367 (1983), on which the Secretary places principal reliance, did not involve a due process challenge of the sort raised here. It is one thing to say that the government, acting as employer, may establish an exclusive administrative mechanism to review personnel decisions -- even those involving constitutional issues -- so long as the available procedure operates in a

fair and impartial manner. This Court, however, gave no indication in Bush that it would have upheld an administrative process that ruled against the employee in a fixed percentage of cases without regard to the evidence presented. This case presents that situation. Simply put, the government may not rest on the claimed exclusivity of its administrative procedures when the constitutional challenge turns on the neutrality and fairness of those procedures themselves.

B. Respondents Have Suffered Injuries Separate And Distinct From Those Caused By Their Loss Of Benefits

The nature of respondents' property interest is not limited to the amount of benefits received. Rather, as in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), respondents have an interest in

the uninterrupted use of benefits during the pendency of administrative proceedings. As Justice Harlan put it, "[t]he 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit." Sniadach, 395 U.S. at 342 (Harlan, J., concurring)(emphasis in original). See Eldridge, 424 U.S. at 340.

Deprivation of the use of respondents' sole source of regular income during the "torpidity of th[e] administrative review process," Eldridge, 424 U.S. at 342,12/

12/ Respondent Adelerte had no regular source of income for 11 months between August 1981 and August 1982. Respondent Harris had no regular source of income for 10 months between March 1982 and January 1983. Accord Eldridge, 424 U.S. 341-42 ("[t]he Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months"). Respondent Chilicky received no benefits from October 1981 until July (continued...)

gave rise to two kinds of injuries that were not redressed by retroactive restoration of benefits. The first, of course, arose from the deprivation of "the very means by which to live," Goldberg, 397 U.S. at 264. "Since [the recipient] lacks independent resources, his situation becomes immediately desperate." Ibid.

In addition, a separate and distinct harm is done by the deprivation of due process itself. The Court has long understood that the exercise of rights secured by the Constitution has value to the individual in and of itself, apart from any economic harm also incurred. Prominent among those rights, for example, is the

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12/ (...continued)
1982, when he reapplied and was accepted for benefits. On January 19, 1988, a decision was rendered reinstating respondent Chilicky's benefits retroactively for the period October 1981 through June 1982.

right to vote secured by the Fifteenth Amendment. As Justice Holmes wrote in Nixon v. Herndon, 273 U.S. 536 (1927), "[t]hat private damage may be caused by [denial of the right to vote], and may be recovered for in a suit at law, hardly has been doubted for over two hundred years . . . ." Id. at 540.[13/] Needless to say, one who is denied the franchise will invariably be unable to demonstrate that the denial altered the election or in any way caused economic injury.

In equal measure, the freedom of association has value to the individual, and "involuntary diversion from a protected activity" "would merit 'fair compensation'" for the diversion. Hobson v. Wilson, 737

13/ See also Lane v. Wilson, 307 U.S. 268, 273-74 (1939); Wiley v. Sinkler, 179 U.S. 58, 64-65 (1900); Stachura, 106 S.Ct. at 2545 n.14.

F.2d 1, 62 (D.C.Cir. 1984), cert. denied, 470 U.S. 1084 (1985); see Stachura, 106 S.Ct. at 2544; id. at 2547 (Marshall, J., concurring in judgment).[14/]

Denial of due process of law by a corrupt or partial administrative hearing officer likewise causes injury amenable to compensation. Valuation of the injury according to the principle of compensation, Stachura, 106 S.Ct. at 2544-46, might well entail consideration of the time and expense associated with pursuing fruitless or corrupt administrative appeals, obtaining unnecessary or duplicative information from physicians or other sources, as well as other hardships,

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14/ Of course, valuation of the injury must not be "wholly divorced from any compensatory purpose," Stachura, 106 S.Ct. at 2545, and suitable instructions setting forth the principle of compensation must be fashioned.

burdens and expenses unnecessarily incurred because of the violation. To the extent that such burdens and hardships are difficult to value, some form of presumed damages may be appropriate. Id. at 2545. And in the event that the expense and burden are not reasonably quantifiable, an award of nominal damages would be proper. Carey v. Piphus, 435 U.S. at 266.

We do not understand respondents to argue that unintentional errors of procedure in individual cases would give rise to such due process claims, see Daniels v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 527 (1981), nor is such a claim before the Court.15/ However, when an actionable due process

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15/ Petitioners advance no argument that respondents' claims would be subject to dismissal under the doctrine of Daniels and Parratt.

claim is stated, it is manifestly clear that actual, compensable constitutional injury is suffered separate and apart from the loss of benefits.

C. Foreclosure Of All Judicial Remedies For The Deprivation Of Constitutional Rights Violates Due Process Of Law

The injuries suffered by respondents cannot be recompensed through the administrative process; to the contrary, they are allegedly to have been caused by corruption of that very process. For respondents, as in Bivens, "it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring).

Petitioners nevertheless contend that Congress has foreclosed, expressly or by implication, the sole and exclusive meaningful remedy for this deprivation of constitutional right. For the reasons set

forth in Point II, infra, Congress did no such thing; the 76th Congress quite clearly intended and expected that claims of constitutional right would proceed under the general federal question jurisdiction independently of any claim for statutory benefits asserted under the Social Security Act. However, had Congress purported to withhold from the federal judiciary jurisdiction to redress substantial constitutional claims of right, the withdrawal of judicial power would itself have been constitutionally infirm.

To be sure, the jurisdiction of the federal courts is subject to regulation by Congress.16/ Like any exercise of congressional authority, however, the

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16/ See Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Sheldon v. Sill, 49 U.S. (18 How.) 441, 449 (1850).

regulation of federal judicial power is subject to constraints imposed elsewhere in the Constitution. See e.g., Estep v. United States, 327 U.S. 114, 120-23 (1946); id. at 127-28 (Murphy, J., concurring); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948).17/ As these cases confirm, the due process clause imposes substantive

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17/ The court in Battaglia held:

> We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court,[] it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . .

169 F.2d at 257 (footnote omitted).

limitations on congressional power to withdraw federal jurisdiction in an unconstitutional manner.[18/]

Just as due process imposes fundamental limitations on congressional power to withhold federal jurisdiction, the due process clause clearly mandates limitations on legislative power to foreclose judicial remedies for constitutional wrongs. This Court has held, for example, that except in extraordinary circumstances,[19/] the due process clause forbids an absolute legislative prohibition on temporary injunctive relief against state action challenged on constitutional grounds. Porter v. Investors' Syndicate, 286 U.S. 461, 471 (1932); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 204-05 (1924). That conclusion is compelled by the overriding command, imposed by the due process clause, that a prior opportunity to obtain equitable relief against deprivations of constitutional magnitude must be provided -- even when, as in Porter

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18/ See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv.L.Rev. 1362, 1372 (1953)("the power to regulate jurisdiction is subject in part to the other provisions of the Constitution"); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan.L.Rev. 895, 921 n.113 (1984).

19/ See Yakus v. United States, 321 U.S. 414, 439-40 (1944). Even in Yakus, however — arguably the high-water mark of congressional restraint on judicial remedies to redress constitutional injury (continued...)

19/ (...continued)
— the Court made it plain that while a restriction on the power of the Emergency Court of Appeals to issue interlocutory injunctive relief could be sustained in light of the wartime emergency, any restriction on the exercise of that court's final injunctive powers would be unconstitutional. Id. at 434-35.

and Kuykendall, the deprivation is of temporary duration.20/

More recently, the Court has observed that "'[a]ll agree that Congress cannot bar all remedies for enforcing constitutional rights.'" Bowen v. Michigan Academy of Family Physicians, ___ U.S. ___, 106 S.Ct. 2133, 2141 n.12 (1986)(quoting Gunther, note 16, supra, 36 Stan.L.Rev. at 921 n.113). Consistent with that understanding, the Court held last Term

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20/ Analytically, legislative restrictions on judicial power to prevent constitutional injury are the obverse of legislative authorization to executive officials to restrain liberty or property in ways that may cause constitutional injury. Constitutional limitations on executive power to infringe on constitutionally protected interests are therefore cognate to, and have their counterpart in, analogous restraints on judicial power to prevent such infringement and are, for that reason, subject to similar due process constraints. See Estep v. United States, 327 U.S. at 127-28 (Murphy, J., concurring); St. Joseph Stock Yards Co. v. United States, 298 U.S. at 51-52.

that compensation must be paid for temporary deprivations of property under the "just compensation" clause of the Fifth Amendment. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. ___, 107 S.Ct. 2378, 2385-89 (1987).

On numerous occasions the Court has either construed congressional enactments in a manner that would avoid irremediable constitutional injury,21/ or noted pointedly that no constitutional question

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21/ E.g., Bowen v. Michigan Academy of Family Physicians, 106 S.Ct. at 2141 n.12; Califano v. Sanders, 430 U.S. 99, 109 (1977); Weinberger v. Salfi, 422 U.S. at 762; Johnson v. Robison, 415 U.S. 361, 366-67 & n.8 (1974); Abbott Laboratories v. Gardner, 387 U.S. 136, 139-48 (1967); Harmon v. Brucker, 355 U.S. 579, 581-83 (1958); Stark v. Wickard, 321 U.S. 288, 309-10 (1944); Shields v. Utah Idaho Central R.R., 305 U.S. 177, 183-84 (1938).

was presented.[22/] And although this Court has indicated that Congress may afford an adequate alternative to a damage remedy to provide redress for constitutional wrongs, Bush v. Lucas, 462 U.S. at 372-73, 388-90, the Court has never sustained a prohibition on all meaningful relief for constitutional injury.

By precluding meaningful relief for injuries sustained by reason of constitutional violation, preclusion of a damage remedy in this action would be constitutionally infirm. The Secretary's reliance on retroactive restoration of benefits is simply off the mark, for the injury is in no sense redressed by such restoration. Nor is any other adequate form of redress apparent.

22/ United States v. Erika, Inc., 456 U.S. 201, 206 n.5 (1982).

For these reasons, the Secretary's contention that Congress foreclosed relief to respondents under the general federal question jurisdiction raises serious constitutional concerns. However, those concerns need not be addressed in this case since, as demonstrated below, the Social Security Act does not bar -- either explicitly or implicitly -- the constitutional claims respondents raise in their complaint.

II. CONGRESS INTENDED AND EXPECTED THAT CLAIMS FOUNDED ON THE CONSTITUTION, IN WHICH BENEFITS WERE NOT SOUGHT, WOULD PROCEED UNDER THE GENERAL FEDERAL QUESTION JURISDICTION

A careful examination of the legislative history and context of the Social Security Act supports respondents' claim that Congress intended to allow actions to enforce constitutional rights

to proceed under the general federal question jurisdiction. The Secretary's contention that Congress intended to prohibit such actions by enacting §§205(g) and (h) is unsupported by the historical record.

A. The Rule Of Crowell and St. Joseph's

During the early part of the century, this Court held that persons challenging rate-making orders of federal or state agencies on constitutional grounds were entitled to an independent judicial determination of the constitutionality of agency action. Prendergast v. New York Telephone Co., 262 U.S. 43, 50 (1923); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920). In 1930 and again in 1931, this Court deferred decision on the significant question of whether the rule of

Prendergast and Ben Avon required independent judicial review of constitutional issues raised in the course of administrative adjudication.23/

That open question was finally resolved in Crowell v. Benson, 285 U.S. 22 (1932), holding that persons challenging agency determinations resting on "constitutional" or "jurisdictional" facts had a constitutional right to independent, de novo judicial review of those determinations. 285 U.S. at 54-61 (1932). Notwithstanding a clear statutory directive authorizing judicial review for errors of

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23/ See Phillips v. Commissioner, 283 U.S. 589, 600 (1931); Tagg Brothers & Moorhead v. United States, 280 U.S. 420, 443-44 (1930)("The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him — save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now").

law only, the Crowell Court construed provisions of the Longshoremen's and Harbor Workers' Compensation Act to permit de novo review of fact and law in order to conform to constitutional requirements.

In 1936, this Court strongly reaffirmed the holding in Crowell v. Benson requiring that Congress afford de novo judicial review of fact and law for constitutional claims of right. See St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936). The right of independent judicial review required by Crowell, the Court held, could not be "circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." Id. at 52. Thus, by 1936 this Court had firmly held that de novo judicial review must be

afforded for claims arising under the Constitution.

B. The 1939 Social Security Act Amendments

The 1935 Social Security Act contained no provision governing judicial review. See Ellis v. Blum, 643 F.2d at 74 n.4. Concluding a three-year study, in 1939 the Social Security Board transmitted to Congress a Report recommending changes to the Social Security Act,[24/] including its provisions governing judicial review. Although the Board had recommended that "findings of fact and decisions of the Board in the allowance of claims shall be final and conclusive," Congress, in recognition of the holdings in Crowell and

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24/ Report of the Social Security Board Recommending Changes in the Social Security Act, H. R. Doc. No. 110, 76th Cong., 1st Sess. (1939).

St. Joseph's rejected that recommendation, and adopted instead §§205(g) and (h).

In an argument divorced from historical context, the Secretary now contends that §205(h) precludes reliance on §1331 as a jurisdictional basis for respondents' constitutional claims. Rather, the Secretary argues, respondents' only avenue of judicial relief is through §205(g).

The flaw in this argument is that it presumes, without basis, that Congress willfully disregarded this Court's then recent holdings in Crowell and St. Joseph's when it amended the Social Security Act in 1939. Under §205(g), a court is constrained by the substantial evidence test in reviewing agency determinations. Yet Crowell and St. Joseph's clearly held that judicial review in cases arising under

the Constitution may not be restricted by any such limitation.

As Chief Justice Hughes explained in St. Joseph's, deference to administrative fact-finding, later incorporated by Congress in §205(g), is only appropriate "provided the requirements of due process which are specifically applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." 208 U.S. at 51 (emphasis added). When those due process requirements are not met, Chief Justice Hughes added in a notable disclaimer, "there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." Id.

at 52. Accordingly, Congress routed claims "arising under this title" though §205(g); cases arising under the Constitution, in contrast, and governed by the rules of Crowell and St. Joseph's, were preserved for litigation under the general federal question jurisdiction.

The Secretary's contention that Congress foreclosed §1331 jurisdiction in cases such as this necessarily presupposes that Congress intended to violate the rule of Crowell and St. Joseph. Such an inference is unfair and unwarranted. As this Court has frequently observed, the ordinary presumption must be "that our elected representatives, like other citizens, know the law." Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979); see Director, Office of Workers'

Compensation Programs v. Perini North River Associates, 459 U.S. 297, 319 (1983).

Knowing the law of Crowell and St. Joseph's, it is far more reasonable to assume that Congress understood and anticipated that constitutional challenges to the Social Security Act would be brought under §1331 (or its predecessor statute) rather than the restrictive provisions of §205(g). Moreover, the "arising under" language of §205(h) supports that result. As this Court noted when reviewing an analogous phrase in the Veterans' Act, see Bowen v. Michigan Academy, 106 S.Ct. at 2140 n.8, constitutional claims do not "arise under" the statute they challenge; instead they arise under the Constitution

itself. Johnson v. Robison, 415 U.S. 361 (1974).25/

C. The Constitutional Damage Remedy Is Consistent With The Legislative Scheme

The legislative history and context surrounding the enactment of §205(h) make it evident that a constitutional damage remedy is entirely consistent with the statutory scheme for judicial review under the Social Security Act. Congress certainly anticipated de novo review of constitutional issues of fact and law under the general federal question jurisdiction in challenges to the constitutionality of the Act, regulations, or policies of the

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25/ Significantly, both the House and Senate Reports on the 1939 amendments state in identical language that the Social Security Act's administrative provisions "are similar to those under which the Veterans' Administration operates." H. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939).

Secretary. Likewise, Congress expected the exercise of injunctive and, when appropriate, mandamus relief to enforce those constitutional rights. An award of damages in these circumstances does not differ fundamentally from issuance of injunctive, declaratory, or mandamus relief; indeed, in many circumstances damages would arguably be the least intrusive remedy.

Accordingly, unlike the circumstance addressed in Bush v. Lucas, 462 U.S. at 389, "a new species of litigation" is simply not at issue. Congress long ago evaluated the impact of constitutional litigation against the Secretary under the general grant of federal jurisdiction and decided in its favor. The availability of damages -- "a particular remedial mechanism normally available in the federal courts,"

Bivens, 403 U.S. at 397 -- complements the congressional scheme.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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Dated: January 22, 1988

AMICUS CURIAE

BRIEF

No. 86-1781

In The
Supreme Court of the United States
October Term 1987

RICHARD SCHWEIKER, et al.,
Petitioners,

v.

JAMES CHILICKY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ALLIANCE FOR THE MENTALLY ILL, THE WHITE LUNG ASSOCIATION, THE ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS, AND STOP ABUSE OF THE DISABLED AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI ORGANIZATIONS

Pursuant to Supreme Court Rule 36, counsel for the petitioners and respondents have consented to the filing of this brief amici curiae. Their letters of consent have been filed with the clerk of the court.

The National Mental Health Association is the nation's largest private, voluntary organization providing leadership to confront the entire range of issues impacting mental disorders and mental health at the local, state and national level. Membership includes concerned citizens, current and former consumers of mental health services, family members whose loved ones suffer from mental illnesses, and mental health professionals. The Association strives to make mental health a major national priority.

The National Alliance for the Mentally Ill is a self-help organization of families of mentally ill persons, of mentaly ill persons themselves, and of friends. Composed of more than 650 local and state Alliances for the Mentally Ill all across the country, totaling nearly 40,000 members, its goals are mutual support, education and advocacy for the victims of mental illness, especially schizophrenia and manic and other disabling depressions.

The White Lung Association is a national non-profit educational organization founded in 1979 by victims of asbestos-related diseases. It conducts educational programs for asbestos victims and the general public and provides technical assistance programs for building owners. The Social Security Administration (SSA) has denied disability benefits to many of the Association's members. In the early 1980's SSA also terminated the disability benefits of many Association members.

The Alliance of Social Security Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to the recent illegal denials and terminations of benefits to disabled Americans by the Social Security Administration. At this time, the Alliance has approximately 3,000 members in eighteen states.

Stop Abuse of the Disabled (SAD) is an advocacy group comprised of disabled individuals. SAD came into existence formally in November, 1982 in response to the outcry from disabled people who had been unfairly cut off the Social Security disability rolls. SAD has over 2,000 members, all of whom reside in Massachusetts.

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SUMMARY OF ARGUMENT

Disability claimants wrongfully terminated from receipt of Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits should be afforded a *Bivens*[1] remedy for provable due process violations to adequately compensate them for emotional distress, and loss of food, shelter and other necessities.[2] In

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1 *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388 (1971).

2 While respondents sought money damages for "emotional distress and for loss of food, shelter and other necessities proximately caused by [petitioners'] denial of benefits without due process," Pet. App. 3a n.2, a *Bivens* remedy conceivably could include damages for worsening of physical impairments following an unconstitutional termination of benefits.

establishing procedures for administrative and judicial review of continuing claims for Social Security benefits pursuant to 42 U.S.C. § 405(g), Congress has not foreclosed the option of a *Bivens* action to vindicate the rights of wrongfully terminated disability clamants.[3] Congress has been aware of widespread harm and suffering occasioned by wrongful termination of claimants from Social Security disability benefits. However, while making repeated changes in the Social Security disability laws with the intent to modify or correct these problems,[4] Congress has remained aware of widespread judicial dissatisfaction with SSA's continuing wrongful terminations and denials of benefits,[5] especially those based upon the Secretary's

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3 *See Ellis v. Blum*, 643 F.2d 68, 75-76 (2d Cir. 1981).

4 *See, e.g.*, Social Security Disability Benefits Reform Act of 1984, Pub.L. No. 98-460, 98 Stat. 1794.

5 One judge went so far as to declare that "if the Secretary persists in pursing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and her individual capacities." *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring). *See Hidalgo v. Bowen*, 822 F.2d 294 (2d Cir. 1987) ("For 15 years when reviewing the grant or denial of disability benefits claims, we in this Circuit have consistently adhered to the treating physician rule. Yet, insofar as can be discerned from this record the Secretary of Health and Human Services has not heeded this message. Even though he avows that the administrative rule is in complete conformity with ours, the adjudicators—who decide the disability claims—must live in an administrative 'never-never land' because they appear never to have heard of the treating physician rule. Thus, because once again this rule was totally ignored by an administrative law judge on denying disability benefits to a claimant, we reverse the administrative decision."); *Hansen v. Heckler*, 783 F.2d 170, 176 (10th Cir. 1986) ("unfortunately, the Secretary has a history of disregarding those controling court rulings

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policy of nonacquiescence in circuit court decisions. Even though the nonacquiescence policy is no longer at issue in this case, judicial reaction against it is illustrative of the Secretary's attitude and approach. Moreover, while the qualified good faith immunity defense was raised successfully here by petitioners, it is not clear that that defense would succeed in subsequent cases.

Congress has neither explicitly precluded a *Bivens* remedy, pursuant to 42 U.S.C. § 405(h), nor implicitly pre-

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with which she disagrees."); *Stone v. Heckler*, 752 F.2d 1099, 1106 (5th Cir. 1985) ("in view of both the Secretary's position in this case and our recent experience with cases where the disposition has been on the basis of non-severity, we will in the future assume that the ALJ and Appeals Council have applied an incorrect standard to the severity requirement" unless certain relevant information was specified in the opinion); *Merli v. Heckler*, 600 F. Supp. 249, 254 (D.N.J. 1984) ("the present policy of the Department of Health and Human Services has demonstrated contempt for the rulings of the federal courts and for the rights and needs of the people affected by its arrogance. Congress makes the law. The judiciary interprets it. The Executive administers it. In this instance, the Department of Health and Human Services apparently has arrogated all three functions unto itself."); *Ornelas v. Heckler*, 598 F. Supp. 1089, 1090 (D. Colo. 1984) ("if this were anything other than an agency of the United States government, I would have every one of those people [the appeals council] in here for contempt of court. I think their conduct is unconscionable and it's despicable. This case is one of the most outrageous examples of the abuse of governmental authority that I have encountered, not only since I have been on the bench but in 25 years in the law. It is an outrage. There is no evidence, there is no authority for what they have done."); *McLean v. Heckler*, 586 F. Supp. 1364, 1365 (E.D. Pa. 1984) ("this case presents an appalling example of sheer bureaucratic dishonesty. The evidence shows overwhelmingly that the claimant is totally disabled and for the ALJ to hold otherwise is an indulgence in the most blatant hypocrisy. If the purpose of the United States Department of Health and Human Services is to crush defenseless human beings, as it seems to be, it would succeed unless in cases like this, courts interposed a protective arm.").

cluded such a remedy by comprehensively occupying the field of Social Security procedures. Without an express or implied Congressional preclusion of a *Bivens* remedy, the Court should specifically recognize such a remedy to afford a means of compensation to those who have been irreparably harmed by wrongful terminations. Both this Court and lower courts have recognized that a subsequent favorable administrative or judicial determination does not compensate a disabled individual for emotional distress or loss of food, shelter and other necessities during the period the individual is without disability benefits. Indeed, in some instances, wrongful terminations have resulted in suicide, while in other cases individuals died from their impairments shortly after being informed by petitioners that they were not sufficiently disabled to continue receiving Social Security disability benefits.

Contrary to petitioners' argument, affording a *Bivens* remedy is unlikely to result in an avalanche of litigation against them. Numerous practical and procedural obstacles would halt the floodgates of litigation which petitioners prophecy. For example, any claimant pursuing a *Bivens* remedy would have to overcome petitioners' good faith immunity,[6] would need to establish a constitutional violation of the claimant's rights, and would need to prove substantial measurable emotional distress or other harm. These obstacles, unacknowledged by petitioners in their brief, would severely limit the number of *Bivens* actions which would be brought against petitioners in the event the Court affirms the decision of the Ninth Circuit Court of Appeals in this case.

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[6] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

ARGUMENT

I. DISABILITY CLAIMANTS WRONGFULLY TERMINATED FROM RECEIPT OF SOCIAL SECURITY DISABILITY BENEFITS SHOULD BE AFFORDED A BIVENS REMEDY FOR PROVABLE DUE PROCESS VIOLATIONS TO ADEQUATELY COMPENSATE THEM FOR EMOTIONAL DISTRESS, AND LOSS OF FOOD, SHELTER AND OTHER NECESSITIES.

A. SSA HAS WRONGFULLY TERMINATED THOUSANDS OF CLAIMANTS.

During the past decade, SSA's procedures and policies have provoked widespread criticism and condemnation.[7] This negative response represented a dramatic change from the positive image SSA had enjoyed for many years as the agency providing retirement benefits for the elderly and disability benefits for the severely disabled.[8] The criticism arose from the application of SSA

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[7] For example, one court observed with no small degree of frustration: "No one, including this court, wants to see undeserving claimants receive benefits. What appears to be happening is that benefits are being denied by the Secretary not on the merits in individual cases, but on a more restrictive policy that is result oriented rather than justice oriented." *Jones v. Heckler*, 583 F. Supp. 1250, 1253 (N.D. Ill. 1984).

[8] In adopting the Social Security Disability Benefits Reform Act of 1984, *supra*, note 4, the House Ways and Means Committee stated:

> The committee is deeply concerned about the erosion of public faith and confidence in the Social Security disability programs, and in the agency as part of the federal government, that has occurred as a result of the changes in policies over the last several years. The guidelines established in this bill appear to the committee to be the best way to restore confidence in the program. The committee believes it is crucial to continued public support for the Social Security program as a whole for the public to understand that the program will be administered according to the law rather than by constantly shifting and possibly arbitrary policies.

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policies that resulted in the termination of benefits for thousands of individuals who were still generally considered to be severely disabled. Between 1981 and 1984 some 500,000 disability recipients were terminated from the disability rolls.[9] These terminations led to Congressional enactment of the Disability Benefits Reform Act of 1984, *supra*. These terminations resulted primarily from SSA's failure to require a showing of medical improvement and its illegal secret policy of evaluating mental impairment claims. SSA persisted in its non medical improvement policy, even though all circuit courts of appeal (except the D.C. Circuit, which did not rule on the issue), decided against petitioners' position.[10]

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1984 U.S. Code Cong. and Admin. News 3038, 3039-40 (House Report No. 98-618).

[9] Symposium on Federal Disability Benefit Programs, Report and Recommendations, Case Western Reserve School of Law, October 11-12, 1985, at 3.

[10] *1st Cir.: Miranda v. Secretary of HEW*, 514 F.2d 996, 998 (1975); *2nd Cir.: DeLeon v. Secretary of HHS*, 734 F.2d 930, 936-37 (1984); *3rd Cir.: Kuzmin v. Schweiker*, 714 F.2d 1233, 1237 (1983); *4th Cir.: Dotson v. Schweiker*, 719 F.2d 80 (1983); *5th Cir.: Rivas v. Weinberger*, 475 F.2d 255, 258 (1973); *Ransom v. Heckler*, 715 F.2d 989 (1983); *6th Cir.: Hayes v. Secretary of HEW*, 656 F.2d 204, 206 (1981); *Haynes v. Secretary of HHS*, 734 F.2d 284 (1984); *7th Cir.: Cassiday v. Schweiker*, 663 F.2d 745, 746 (1981); *8th Cir.: Weber v. Harris*, 640 F.2d 176, 178 (1981); *9th Cir.: Finnegan v. Mathews*, 641 F.2d 1340, 1347 (1980); *Patti*

(Continued on following page)

The upsurge in litigation against SSA has embraced many policies alleged by respondents to violate their due process rights, including knowing use of unpublished rules and standards contrary to the Social Security Act. This was the very practice found illegal in *Bowen v. City of New York*, 106 S.Ct. 2022 (1986). Some of respondents' other claims have been litigated, although not necessarily as due process violations, such as inordinate delays in the administrative review process and intentional disregard of dispositive favorable evidence (cases challenging SSA's failure to give proper weight to treating physicians' reports). Finally, respondents' allegation of illegal imposition of quotas on SSA decisionmakers is supported by the findings of one Congressional committee, which concluded that "SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program . . . "[11]

In these areas, and many others, both the courts and Congress have become frustrated with what they perceive to be repeated instances of wrongful terminations of benefits.

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v. *Schweiker*, 669 F.2d 582 (1982); *Iida v. Heckler*, 705 F.2d 363 (1983); *10th Cir.: Byron v. Heckler*, 742 F.2d 1232 (1984); *11th Cir.: Simpson v. Schweiker*, 691 F.2d 966, 969 (1982); *Vaughn v. Heckler*, 727 F.2d 1040 (1984). SSA's illegal evaluations of mental impairments were described in *Bowen v. City of New York*, 106 S.Ct. 2022 (1986) and *Mental Health Ass'n of Minn. v. Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), *aff'd in pertinent part, modified in part*, 720 F.2d 965 (8th Cir. 1983).

[11] The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program, Report of Subcomm. on Oversight of Gov't Management, Sen. Comm., on Gov'tal Affairs, 98th Cong., 1st Sess., Oct. 1983, at 36.

B. WRONGFUL TERMINATIONS CAUSE CLAIMANTS HARM WHICH CANNOT BE COMPENSATED BY RETROACTIVE BENEFITS.

This court noted in *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976), that an unconstitutional termination of benefits may inflict losses that simply cannot be compensated through a retroactive award after an administrative hearing. In more recent years, the lower courts have repeatedly acknowledged this to be the case.

In *Lopez v. Heckler*, for example, the Ninth Circuit noted:

> [T]he district court has found that some class plaintiffs have already died or suffered further illness as a result of the Secretary's actions. We agree with that finding. In the absence of an injunction other old or infirm people will die or be subjected to additional serious pain and suffering.

725 F.2d 1489, 1497 (9th Cir. 1984), *cert. granted and vacated*, 469 U.S. 1082 (1984), 753 F.2d 1464 (9th Cir. 1985).

In its decision, the *Lopez* Court chastised the Secretary of Health and Human Services for what it held was its illegal policy of nonacquiescence. As the court noted, "The Secretary here precisely knows what the courts say the law is and is nevertheless refusing to apply the law as so defined. That the Secretary, as a member of the Executive, is required to apply federal law as interpreted by the federal courts, cannot seriously be doubted. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) . . . . " 725 F.2d at 1503.

In another medical improvement case a district court observed that "the severe harm suffered by the plaintiff class is well documented in the testimony and affidavits submitted at the preliminary injunction hearing. It has encompassed economic hardship, physical and emotional suffering and perhaps even death." *Holden v. Heckler*, 584 F. Supp. 463, 472 (N.D. Ohio 1984).

Similarly, the Court recently noted with approval the district court's finding of tremendous harm caused by wrongful termination of benefits to the severely mentally ill:

> [t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback. Many persons have been hospitalized due to the trauma of having disability benefits cut off. Interim benefits will not adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals.

City of New York v. Heckler, 578 F. Supp. 1109, 1118 (E.D.N.Y. 1984), cited in *Bowen v. City of New York*, 106 S.Ct. 2022, 2032 (1986).

1. Wrongful Deaths

Wrongful deaths, suicides and emotional distress have resulted from illegal terminations of benefits. Senator Howard Metzenbaum reported at least 32 deaths of disabled individuals due to their disabling conditions after the Secretary of HHS had terminated benefits:

> "the situation has reached a crisis point. My staff has documented at least 32 deaths of persons who were told by SSA that their benefits were being terminated because they were no longer disabled and who then died shortly thereafter of their disabling condition."

Congressional Record S13853 (Sept. 3, 1982).[12]

One such victim was Felix Williams, who died in 1982 after being told he was no longer disabled enough to receive Social Security Disability benefits. Felix's widow, Pearl F. Williams, described for a Congressional Committee what happened:

> When he [Felix] was called for his exam, he wasn't worried about it because he felt that if there was any justice at all, his pension wasn't in jeopardy. But when he returned from his examination he was really shocked, because it was such a mockery. He was re-evaluated—he said he was shocked. He said he felt like he was back in Germany again where they guarded the war prisoners. That's where he was in service one time. He said, "We were crowded into small dirty rooms down on Bryant Street and herded through the exams like cattle." It was very humiliating the way they carried it out. "A couple of smart aleck kids" was the way he described it, you know, conducting the exams. It was real quick and lasted less than ten minutes. He said they never checked his heart, and that was the reason he was retired in the first place for years, because of a serious heart attack. He mentioned, too, that they didn't have any

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12 *See also* "Benefits OK'd a Week After He Died," *Philadelphia Daily News*, page 6, (Dec. 10, 1982); "Disabled: What Happens When Uncle Sam Says You're OK?" *Akron Beacon Journal*, page D1 (July 11, 1982). Dona Montgomery, founder of amicus Alliance of Social Security Disability Recipients, testified before Congress in 1983 that her organization was aware of 13 termination related deaths in North Carolina alone. Social Security Disability Review: A Federally Created State Problem, Hearing Before the Select Comm. on Aging, House of Rep., 98th Cong., 1st Sess. (June 20, 1983), at 231.

medical records and didn't seem interested in it. He lifted 50 lbs. as part of the examination.

That was in July 1982. Then shortly after that they notified him that he would receive his last check on September 1, his disability check, but that he could appeal his case in ten days. That's what he did. He appealed his case and it was denied again based upon the Allied Medical report.

Then after that, after they denied his appeal—he would have went before the law judges—but he began to crumble. He began to crumble mentally because physically already he had such problems then he began to crumble mentally. He couldn't sleep and he couldn't eat. He was just so worried. He said he would be labeled a "bum and loafer" and that was his greatest fear. He couldn't sleep or eat.

Then in September, we admitted him to the Veterans Hospital for severe depression. They put him on the 7th floor in the psychiatric ward. Two weeks later he died of a heart attack in the hospital. He died up there, and that was the reason—they stated on his death certificate that that was the reason for his death, was because of the stress when he was cut off from his income.[13]

Unfortunately, Mr. Williams' situation was not unique. At about the same time William Denny of Elgin, Illinois died of a heart attack. According to his widow, Loretta, when Mr. Denny's benefits were terminated by SSA in 1982, his "condition was steadily getting worse. He was experiencing increasingly severe chest pains for longer periods of time than when he first had his heart

[13] Social Security Disability Insurance and Supplemental Security Income Programs, Hearing Before a Subcomm. of the Comm. of Gov't Operations, House of Rep. (Dec. 11, 1985) at 77-78.

attack. He was having increased episodes of numbness in his right arm, he was more frequently short of breath, and he began having recurrent periods of excessive perspiring with accompanying weakness." When Mr. Denny's benefits were terminated, he lost his $591 monthly SSDI benefits and his Medicare coverage was cut off. His wife and grandchild residing with them could not survive on her $200 a week income and Mr. Denny's $198 monthly Veterans Administration pension. The family could no longer afford Mr. Denny's monthly medications, which cost $100 a month. Desperate, Mr. Denny drove a truck for two days in May, 1982, only to be hospitalized a week later as a result of severe angina attack. Although SSA was informed of his angina attack, it did nothing to restore Mr. Denny's benefits. When Mr. Denny was released from the hospital he again took a brief truck driving job to obtain needed money for his family. "After his return, he often did not have the strength to answer me when I spoke to him. He was in severe pain and had to remain lying down at rest," his widow noted. Nine days later, on July 31, 1982, Mr. Denny died of a heart attack.[14]

Another SSDI recipient who died in 1983 after being terminated from benefits was John Rankin of Charlotte, North Carolina. After his death, his widow Margaret noted that upon receiving the notice of termination of his Social Security benefits in September, 1982, Mr. Rankin became very upset and ill. "He had to be admitted to the hospital that same week because the stress and anxiety over the termination had aggravated his heart problem." Mrs. Rankin noted that the termination of John's bene-

[14] Declaration of Loretta Denny, May 13, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra*.

fits was appealed, but the family never received a response from SSA. She observed that the threat of termination "caused John to become unconsolably upset, worried and ill." As a result, "on March 2, 1983, following the continuing threat of termination of his benefits, John died of a heart attack."[15]

Still another recepient who died was Forrest Sisk, Jr. of Gastonia, Georgia. After having been awarded SSDI benefits in 1981 following his third heart attack, SSA notified Mr. Sisk that his benefits would be terminated in June, 1982. According to his widow, Ruth, "upon receiving the Social Security notice of termination, Forrest became very upset and increasingly ill. He did not know how he would be able to pay for our food and his medicines. Forrest's medicines alone cost $200 monthly. Friends brought some gifts of food and other items, but this upset Forrest even more. He would not accept charity from friends." Two months after receiving the SSA notice of termination, Mr. Sisk died of another heart attack.[16]

2. Suicides

At least eight suicides have resulted from illegal terminations of disability benefits.[17] Senator Carl Levin

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[15] Declaration of Margaret Rankin, May 20, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra.*

[16] *See* declaration of Ruth Sisk, May 24, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra.*

[17] Oversight of the Social Security Administration Disability Reviews, Subcomm. on Oversight of Gov't Management, Sen. Comm. on Governmental Affairs, 97th Cong., 2d Sess., 19 (Aug. 1982)

described Evelyn Mattson of Arizona, a 60-year-old woman with a seventh grade education who had worked until 1978 as an assembler, packer and inspector in a plastics factory. According to Senator Levin, "Ms. Mattson took her life two days before an appeal reversal decision [arrived] in the mail. In her suicide note addressed to her daughter she wrote:

> "I never wanted to get old and not be able to care for myself and I can see it coming. I'm sure now I won't get my disability . . ."[18]

The tragedy of suicide also struck the Hooker family of Pasadena, California. After being awarded SSDI benefits in 1977 for a combination of physical injuries and mental impairment, SSA terminated Larry Hooker in September, 1981. According to his attorney, Cindy Graff, Mr. Hooker began looking for jobs after receiving his termination notice and

> then became increasingly despondent and anxious when he was repeatedly denied employment because of his condition. He was suffering from paranoid schizophrenia of extreme severity and long duration, and his doctor warned the Social Security Administration that if his disability benefits were terminated, Mr. Hooker's condition would deteriorate further.

When Mr. Hooker's SSDI benefits of approximately $1,000 for himself, his wife, and two children were cut off, a destitute and fearful Mr. Hooker refinanced his family home and tried to invest the accumulated equity in order to provide a steady income for his family. He lost all of

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[18] Statement of Senator Levin, *Congressional Record* S15103-4 (Dec. 11, 1982).

the money in a few months and became unconsolably frightened and irrational. On April 17, 1982, Mr. Hooker ran a hose into his car and died of carbon monoxide poisoning. Five months later an administrative law judge for SSA found that Mr. Hooker had continued to remain disabled and that he had been wrongfully terminated from benefits.[19]

3. Loss of income, loss of medical care, and suffering of the physically disabled.

Even when death does not result from wrongful termination of benefits, loss of income, loss of medical care and attendant suffering often occur. Many recipients terminated from SSDI or SSI benefits depend on them for their livelihood and have no other source of income.[20] When individuals dependent upon SSDI and SSI benefits are wrongfully cut off, they may resort to less well funded state assistance programs. For example, in Colorado disabled individuals terminated from SSDI or SSI may receive Aid to the Needy Disabled (AND) benefits of $229 per month, an amount substantially less than their SSDI or SSI benefits.[21] Moreover, recipients of AND benefits are not entitled to either Medicaid or Medicare. By contrast, SSDI recipients after two years receive Medicare benefits, while SSI recipients receive Medicaid benefits immediately.

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[19] See declaration of Cindy Graff, May 10, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra*.

[20] A 1980 analysis based upon a study of the disabled in 1972 found that 56.1% of the disabled receive no income other than SSDI. *Muller*, "Receipt of Multiple Benefits by Disabled Worker Beneficiaries," *Social Security Bulletin*, Vol. 43, No. 11, pages 3-19 (Nov. 1980).

[21] See Colo. Rev. Stat. § 26-2-119 (1973). The 1988 federal SSI benefit level for a disabled person with no other income is $354 per month. 52 Fed. Reg. 41672-76 (Oct. 29, 1987).

This loss of Medicaid or Medicare raises serious problems for those who are, by definition, ill. First, these individuals generally lack the financial resources to obtain alternative medical insurance. As Senator Sasser has noted, "In many instances, Medicare eligibility is absolutely essential as it is nearly impossible for disability recipients to receive adequate medical insurance because of high premiums or outright refusal by the insurance carrier."[22] Indeed, retroactive reinstatement of health care coverage when an appeal is won is wholly unsatisfactory. It is impossible in December to provide health care that was needed in March. When necessary medical care cannot be obtained, the disabled person's condition is likely to deteriorate.

For example, when Ms. Freddie Howell of Los Angeles was terminated from benefits in March, 1983, her sister observed her "to became increasingly weak and fatigued upon the slightest exertion. She has appeared to have a sickly greyish tint to her complexion and she has had excessive perspiration, increased chest pains and irregular heart beats." According to her sister, Ms. Howell was forced to apply for welfare and did not have the means to pay for her medical needs or her necessities of life. She "has been under intense strain, worry and depression over how she will pay her bills and obtain the medical treatment and medicines she needs to survive.

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[22] Statement of Senator Sasser, *Congressional Record* S7289 (June 22, 1982).

She has become increasingly ill and weak." During this time, Ms. Howell had to undergo emergency open heart surgery with four bypasses. She had originally been found disabled because of poorly controlled high blood pressure, hypertensive cardiovascular disease, rheumatic heart disease and mitral stenosis.[23]

Hardship also befell Jimmie Littles, a 60-year-old former beautician from Los Angeles. After being found disabled because of seizures, high blood pressure, and diabetes in 1980, her benefits were terminated in May, 1982. After her benefits were cut off, she was forced to survive on no income other than general relief of $228 per month. According to Ms. Littles:

> I have been under extreme hardship because I cannot afford to pay for my daily living expenses. I cannot afford to buy the foods I need to maintain my special diet. My utilities were cut off for two weeks because I could not pay my bill. I have borrowed money from family and friends so that I am in debt to everyone I know.
>
> Without Medi-Cal [Medicaid] I have been forced to go without my medicine because I cannot afford to pay for it. I also cannot get the medical care and treatment I need. I am becoming more ill without medical care and medicines.[24]

The Faustino Trejo family of San Bernadino, California also suffered serious harm. Mr. Trejo was awarded

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[23] See declaration of Ida Jones, May 24, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra.*

[24] Declaration of Jimmie Littles, May 26, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra.*

SSDI and SSI benefits in 1980 because of chronic renal failure, congestive heart failure, poorly controlled hypertension, and insulin dependent diabetes. After being terminated in August, 1982, Mr. Trejo received only $263 per month in government benefits. He appealed his termination decision to an administrative law judge, but received an unfavorable decision. While awaiting a further administrative appeal decision from the Appeals Council, Mr. Trejo suffered a massive stroke. Although this stroke was reported to the Appeals Council, it issued a decision on May 11, 1983 upholding the termination of Mr. Trejo's benefits. Mrs. Trejo reported that while her husband's appeal was pending in federal court, her husband's condition was deteriorating and he was becoming increasingly ill. As she noted:

> Faustino needs to stay in a nursing home or a hospital, but because we do not have SSI or Medi-Cal, we cannot afford to pay for this. Faustino is at home with me, but I cannot control him or take care of him. He does not know what he is doing. He is incontinent, he cannot dress himself, feed himself or communicate. He can only say a few words which he screams frequently—"I want to die." He is agitated and violent. He has torn my clothes and beaten me. I presently have a black eye and bruised face from Faustino beating me.
>
> Doctors have given me a harness (strait jacket) to put on Faustino to keep him under control. When he gets very violent, I put the harness on him and take him to the emergency room at the hospital where they will inject him with a sedative. However, the hospital will not take back Faustino because he has no Medi-Cal.
>
> I have no one to help me take care of Faustino. We cannot afford a full-time nurse. I am not able to pay

> for the medical care and treatment Faustino needs on the reduced disability benefits without Medi-Cal. I also am not able to pay for the necessities of life of Faustino, myself and the small grandchild for whom I am responsible. I am in arrears with regard to all of our bills.[25]

Many terminated beneficiaries in Colorado have endured hardship as well. According to Carrie May Reser, founder and president of Disabled American Workers' Security of Colorado, an organization of disabled SSDI and SSI recipients:

> I have witnessed personally the tremendous strain and pressure these reviews and terminations put on people who are already very sick. The appeals process is very frightening to most people, and there is no reason why most should have to go through it when they are still totally disabled.[26]

According to Mrs. Reser, the five greatest worries for terminated beneficiaries are house payments, food, medical bills, medicine and utilities . She noted that these worries were compounded by "the hopeless feeling each felt after turning in to the SSA old and new medical facts proving their disability not only still existed but was worse, and worsens by the stress, strain and worry of not knowing what to do or who to turn to, since SSA paid no attention to doctors or their reports."[27]

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[25] Declaration of Gloria Trejo, May 24, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Lopez v. Heckler, supra.*

[26] Affidavit of Carrie May Reser, April 23, 1983, filed April 25, 1983 in support of plaintiffs' motion for preliminary injunction in *Trujillo* v. *Schweiker,* 569 F. Supp. 631 (D. Colo. 1983).

[27] *Id.*

In Colorado Springs, Gail Timme had been receiving Social Security disability benefits because of multiple sclerosis when she was terminated by SSA in September, 1981. She appealed the termination, but was turned down by an ALJ and appealed further to the Appeals Council, which also denied her benefits. While her case was pending before the Appeals Council, Ms. Timme was forced to rent out part of her house in order to keep living there and was forced to go on welfare. She received Aid to Families with Dependent Children benefits of $149 per month, food stamps, and $175 per month in rent. According to Ms. Timme:

> In order to survive, I have had to sell some items of furniture and I also had to sell most of my deceased husband's personal belongings which I would not have sold had I the choice. I also have had to close off two rooms in my house this winter and keep the thermostat at 60 degrees F. even though I would prefer the temperature to be a little higher because of my baby.
>
> Due to my reduced income, my monthly expenses run approximately $50 minimum to $150 maximum per month over my income and this is the amount I must borrow monthly from friends or relatives to balance my budget.[28]

4. Emotional distress, rehospitalization of the chronically mentally ill.

Compared to those with physical impairments, the chronically mentally ill suffer unique hardships when they are wrongfully terminated. Psychiatrists have noted that an initial denial or termination often causes stress that

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[28] Affidavit of Gail Timme, April 21, 1983, filed April 25, 1983 in support of plaintiffs' motion for preliminary injunction in *Trujillo* v. *Schweiker, supra.*

worsens the claimant's psychiatric condition.[29] At a 1983 Senate Hearing, psychiatrist Beatrice Braun testified that improper termination of the chronically mentally ill had resulted in rehospitalization, marked regression, and overwhelming anxiety.[30]

Dr. Richard Warner, medical director of the mental health center in Boulder, Colorado has found that cutting off clearly disabled SSDI and SSI recipients suffering from psychiatric disabilities "has a seriously damaging effect on their mental status and their precarious adjustment in the community."[31] According to Dr. Warner:

> Most of these clients are being maintained out of institutions by means of their subsidized income and the availability of the Mental Health Center's community support system. They are unable to tolerate stress and being discontinued from financial support, or threatened with discontinuation is an extreme stress. Client B described above became psychotic when he was notified of his financial support being cut off, and it was necessary to admit him to intensive residential treatment. Many hours of his therapist's time and attention have been required to help him negotiate the appeal process. His denial of benefits was finally reversed on appeal. . . . These decisions to deny benefits to clients who are clearly disabled is causing unnecessary trauma and hardship

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[29] Munetz and Roth, *Helping Chronic Patients Understand Agency Communications*, 33 Hosp. and Community Psychiatry 151 (1982).

[30] Social Security Reviews of the Mentally Disabled, Hearings Before the Senate Special Comm. on Aging, 98th Cong., 1st Sess. 39-40 (1983).

[31] Affidavit of Richard Warner, M.D., May 17, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Trujillo v. Schweiker*, *supra*.

> to our clients both financially and psychologically. It is also costing our Mental Health Center thousands of dollars in additional therapist time, admissions to hospital, and admissions to our intensive treatment house (an alternative to hospitalization).[32]

Some people who are not chronically mentally ill develop mental impairments as a result of the stress they bear when they receive termination notices. For example, William Wigginton of Denver, Colorado, had been receiving SSDI benefits because of severe gastrointestinal problems. When he was cut off of benefits in 1981, "My emotional condition deteriorated, I became suicidal, and obtained psychiatric counseling in which the doctor described me as emotionally disabled. My doctor stated I needed intensive therapy but I was unable to afford it."[33]

These emotional problems, on top of Mr. Wigginton's physical impairments, led to his family losing his house and his specially equipped van, and eventually led to Mr. Wigginton and his wife separating.

These numerous examples make it clear beyond peradventure that a wrongful termination of disability benefits can and often does lead to irreparable harm not fully compensable by a later award of retroactive benefits. For these reasons, amici assert that a *Bivens* remedy should be available to wrongfully terminated SSDI and SSI recipients.

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[32] *Id.*

[33] Affidavit of William Wigginton, May 5, 1983, filed in support of plaintiffs' motion for preliminary injunction in *Trujillo v. Schweiker*, *supra*.

II. AFFORDING A BIVENS REMEDY IS UNLIKELY TO RESULT IN AN AVALANCHE OF LITIGATION AGAINST PETITIONERS.

Based solely upon speculation, petitioners argue that recognition of a *Bivens* remedy here would lead to the disruption of the SSA hearing system, "probably the largest adjudicative agency in the Western World."[34] *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted). Petitioners assert "that the potential and likely impact of the court of appeals decision both on the federal courts and the Social Security Administration would be intolerable." Brief for the petitioners, at 46. They suggest that virtually any terminated recipient could allege a due process claim and file a *Bivens* action.

These assertions fail to consider the significant limiting factors which would prevail if a *Bivens* remedy is recognized against SSA officials. First, any claimant bringing a *Bivens* action against SSA officials would have to overcome their probable defense of qualified good faith immunity based upon *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As the court of appeals noted, "with qualified immunity, federal officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." 796 F.2d at 1137. Indeed, the Ninth Circuit rejected two of respondents'

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[34] On the contrary, the very size of the SSA hearing system militates in favor of recognizing a *Bivens* remedy, since it would help deter unconstitutional agency conduct and protect the rights of claimants who might otherwise be crushed by the weight of an enormous bureaucracy.

claims based on its finding that petitioners were protected by good faith immunity. In other situations as well, claimants could not prevail, no matter how serious the harm alleged, unless SSA officials violated "clearly established" statutory or constitutional rights of which a reasonable person would have known. This barrier would significantly limit the number of potential *Bivens* actions, since it would exclude those cases in which the initial SSA decision makers simply made a reasonable legal or factual error, since neither the Social Security Act nor accompanying regulations purport to guarantee an error-free initial assessment.

Second, a *Bivens* action by its very nature is predicated upon a showing of a constitutional violation. Virtually all the court holdings against petitioners in recent years have been based upon statutory or regulatory grounds, not upon a finding of a constitutional violation.[35] It is unlikely that courts would readily find constitutional violations when presented with *Bivens* actions against petitioners.

Third, attorneys would not likely represent claimants in *Bivens* type actions, unless they had suffered a provable and significant amount of emotional distress or other harm as a result of being wrongfully terminated from benefits.[36] *Bivens* actions, similar to personal injury

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[35] *See, e.g., Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987) (weight to reports of treating physician); *Foster v. Heckler*, 780 F.2d 1125 (4th Cir. 1986) (evaluation of pain); *DeLeon v. Heckler, supra* (medical improvement).

[36] *Carey v. Piphus*, 435 U.S. 247 (1978), limits to nominal damages awards for violations of procedural due process where the result is not shown to have been erroneous.

cases, would normally be undertaken on a contingency basis by attorneys.[37] Private attorneys would be unwilling to invest a substantial amount of time representing a claimant who had not suffered a large amount of damages.

The Court rejected a similar floodgates argument made by the Secretary of HHS only recently. In *Bowen v. Michigan Academy of Family Physicians*, 106 S.Ct. 2133 (1986), the Court rejected the Secretary's argument that Congress intended to foreclose review of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program. In so doing, a unanimous court noted, "We do not believe that our decision will open the floodgates to millions of Part B Medicare claims." 106 S.Ct. at 2141 n.11. As the Court further observed, "We observed no flood of litigation in the first 20 years of operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future."[38]

Not only is petitioners' floodgates argument unfounded, but petitioners fail to acknowledge the deterrent

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[37] In his concurring opinion in *Bivens*, Justice Harlan rejected the government's argument—also made here—that limited resources of federal officials and other factors militate against allowing a damages remedy. Noting that these arguments were "ultimately self-defeating," Justice Harlan concluded that "few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly *de minimis*." *Bivens, supra*, at 410.

[38] *Id. See Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 Harv. L.Rev. 778, 792 (1984).

value of constitutional torts.[39] Indeed, a *Bivens* remedy here may serve an important deterrent effect if it ends a practice that is economically or personally damaging to a wrongfully terminated claimant.[40] In the long run, a few successful *Bivens* actions against petitioners will no doubt keep petitioners on their toes and result in a decreasing number of lawsuits against them.

In sum, recognizing a *Bivens* remedy here will allow a relatively small number of claimants to vindicate their constitutional rights and deter unlawful government conduct. As Justice Harlan observed in his concurring opinion in *Bivens*, "Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Bivens, supra*, at 411.

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[39] *See* S. Willig, *"The Breadth of the Tort Perspective: Judicial Review for Tortious Conduct of Governmental Agencies and Agents,"* 45 Mo. L.Rev. 621 (1980).

[40] *Id.*, at 626.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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January, 1988